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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

COMMISSIONERS OF INLAND REVENUE *v.* DALGETY AND COMPANY, LIMITED.

K. B. D.
1929
Jan. 17, 18, 21, 25.
C. A.
May 2, 3, 6, 7; *June* 6.

Revenue—Income Tax—Colonial or Dominion Income Tax—Repayment—Relief—Debenture Stock—Interest thereon—Whether Relief can be obtained in respect of whole Income or only upon Income less Interest paid on Debenture Stock—Finance Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 43*—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 17, 55*—Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27.

By s. 27, sub-s. 1, of the Finance Act, 1920, "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined" as therein set out.

Similar provisions were contained in s. 43 of the Finance Act, 1916, and s. 55 of the Income Tax Act, 1918, which sections have been repealed.

A company, which was incorporated in England under the Companies Acts, had in addition to its share capital issued a large amount of debentures and debenture stock. A portion of the interest on its debenture stock was paid out of income arising in the United Kingdom, the balance of the interest being paid out of the trading profits of the company. A large portion of the income of the company arose from trading profits earned by trading operations in Australia and New Zealand, and Dominion income tax had been paid on its trading profits. The profits of the company were also assessed to United Kingdom income tax under Case I. of Sch. D. The company claimed relief under the above mentioned Acts in respect of Colonial or Dominion income tax paid over a period of eight years from April, 1917, to April, 1924. The question in dispute was whether the amount on which the relief due to the company was to be calculated was the whole amount of the profits earned by it in Australia and New Zealand or only the balance of its profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom:—

Held, by Rowlatt J., that the word "income" in s. 27, sub-s. 1, of the Finance Act, 1920, and the corresponding sections of the Acts of 1916 and 1918, means "income less charges"; and that consequently the company was only entitled to claim relief in respect of its trading profits in Australia and New Zealand less the balance of the debenture interest which was paid out of such profits.

Held, by the Court of Appeal (reversing the decision of Rowlatt J.): (1.) that the word "income" in the relevant sections of the Income Tax Act, 1918, and the Finance Acts, 1916 and 1920, meant "taxable income" and not "income less charges," and the word "paid" in the same sections must be construed in its natural sense and not as meaning "borne," and therefore that the company was entitled to relief under s. 27 of the Finance Act, 1920, and the corresponding sections in respect of all income (including that part applied in paying debenture interest) which had already borne Dominion income tax, although in paying debenture interest the company was entitled to deduct United Kingdom income tax at the full rate; (2.) that s. 17 of the Income Tax Act, 1918, had no application to the relief given by s. 27 of the Finance Act, 1920, just as it admittedly had no application to the relief given by the corresponding sections of the earlier Acts.

CASE stated under the Finance Act, 1921, s. 28, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 7, 1927, for the purpose of hearing appeals, Dalgety & Co., Ld. (hereinafter called "the company"), claimed relief in respect of Colonial or Dominion income tax under s. 43 of the Finance Act, 1916, and s. 55 of the Income Tax Act, 1918, for the

years ending respectively April 5, 1917, April 5, 1918, April 5, 1919, April 5, 1920, and under s. 27 of the Finance Act, 1920, for the years ending April 5, 1921, April 5, 1922, April 5, 1923, and April 5, 1924.

2. The company was a company incorporated in England under the Companies Acts with an authorized capital which during the years in question consisted of 200,000 ordinary shares of 20*l.* each, on all of which 5*l.* per share had been paid up, and 100,000 preference shares of 10*l.* each, of which 50,000 had been issued and fully paid up. The company had also issued debentures and debenture stocks (both of which are hereinafter included in the expression "debentures") which, during the years in question, amounted to approximately 2,500,000*l.* Under these debentures the principal and interest were secured on the whole undertaking and assets of the company.

3. The business of the company was that of general merchants, shipping and insurance agents and bankers. Apart from dividends which were taxed by deduction and income from property, which was charged to income tax under Sch. A, practically the whole of its income arose from trading profits earned by trading operations in Australia and New Zealand, but as the control of the company was exercised in England such trading profits were all assessed to British income tax under Case I. of Sch. D. Dominion income tax had also been paid on such trading profits arising in Australia and New Zealand.

4. For each of the years under review a claim for relief in respect of Colonial or Dominion income tax had been made by the company, and had been admitted in part by the Commissioners of Inland Revenue. No question remained in dispute in regard to the rate at which relief should be granted for any year, the sole point at issue being whether the amount on which the relief due to the company was to be calculated was the whole amount of the profits earned by it in Australia and New Zealand or only the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income

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INLAND REVENUE COMMISSIONERS v. DALGETY & Co.

arising in the United Kingdom. It was agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as there was such income available for the purpose, and consequently to that extent would not affect the amount of relief to which the company might be entitled. The balance of the debenture interest was paid out of the said trading profits.

5. The following figures for two typical years, of which the first was governed by s. 43 of the Finance Act, 1916, and the second by s. 27 of the Finance Act, 1920, illustrate (i.) the method which the company claims, and (ii.) the method which the Crown claims should be followed in calculating the amount of relief due :—

RELIEF, 1918–19.

(*a*)	Total profits		£468,089
(*b*)	Taxed dividends and Sch. A . . .		48,820
(*c*)	Profits (excluding line (*b*)), i.e., trading profits taxed under Case I., Sch. D, and also to Dominion income tax . .		419,269
(*d*)	Debenture interest . . .	£104,065	
(*e*)	Less (*b*) above . . .	48,820	
			55,245
(*f*)	Net profits		£364,024

(i.) *Claimed by the company.*

Relief due on line (*c*), i.e., on whole of profits made in Dominions (not deducting any debenture interest) amounting at agreed rates to £49,713

(ii.) *Allowed by the Revenue.*

Relief due on line (*c*) as above, less balance of debenture interest amounting to 55,245*l.* as above (i.e., relief on line (*f*)) amounting at agreed rates to 43,820

Difference between the two methods . £5,893

RELIEF, 1923–24.

(*a*)	Total profits		£578,051
(*b*)	Taxed dividends and Sch. A		79,506
(*c*)	Profits (excluding line (*b*)), i.e., trading profits taxed under Case I., Sch. D, and also to Dominion income tax		498,545
(*d*)	Debenture interest	£114,228	
(*e*)	Less (*b*) above	79,506	
			34,722
(*f*)	Net profits		£463,823
(i.)	*Claimed by the company.* Relief due on line (*c*), i.e., on whole of profits made in the Dominions (not deducting any debenture interest) amounting at agreed rates to		£50,838
(ii.)	*Allowed by the Revenue.* Relief due on line (*c*) as above, less balance of debenture interest, amounting to 34,722*l.* as above (i.e., relief on line (*f*)), amounting at agreed rates to		47,567
	Difference between the two methods		£3,271

6. In computing the profits for assessment under Case I., Sch. D, no deduction was allowed in respect of debenture interest. In paying such debenture interest the company deducted the full rate of United Kingdom income tax.

7. It was contended on behalf of the company:—

(*a*) That the company had paid United Kingdom income tax on the whole of its income, which included the part thereof earned in Australia and New Zealand.

(*b*) That the company had also paid Colonial or Dominion income tax on the part of its income earned in Australia and New Zealand.

(*c*) That the company was therefore entitled to relief from United Kingdom income tax on all that part of the income.

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INLAND REVENUE COMMISSIONERS v. DALGETY & Co.

(*d*) That the company's right to relief was not affected by the fact that it was entitled to deduct and had deducted United Kingdom income tax on payment of interest to its debenture holders.

8. It was contended on behalf of the Crown (inter alia) :—

(*a*) That the company was not entitled to relief in payment of any income the tax on which it was entitled to deduct out of any payment made by it to any other person.

(*b*) That so far as the profits were applied in payment of debenture interest they were not income of the company within the relief provisions in question.

(*c*) That as the company had not ultimately borne United Kingdom income tax on the amount paid by way of debenture interest, it had not paid such tax within the meaning of the sections providing for the allowance of relief.

(*d*) That the method of computing the relief contended for by the Crown as set out in para. 5 hereof was correct.

9. The Commissioners who heard the claim gave their decision upon the point now in dispute in the following terms :—

" The first question with which we have to deal is whether the company is entitled to Dominion income tax relief upon the whole amount of the profits earned by it in Australia and New Zealand, or only on the balance remaining after deducting from those profits the excess of debenture interest paid by it over the amount of income arising in the United Kingdom.

" The company has, in the first instance, paid United Kingdom income tax on the whole of its profits wherever arising without any deduction in respect of debenture interest. It has also paid Dominion income tax on the profits arising in Australia and New Zealand without deduction in respect of debenture interest. It has deducted United Kingdom income tax from the interest paid to its debenture holders, but has not deducted, and was not entitled to deduct, Dominion income tax from such interest.

" It is urged on behalf of the company that all its profits from Australia and New Zealand, including those which have been applied in the payment of debenture interest, have borne both United Kingdom and Dominion income tax, that in the literal and natural sense the company has paid both taxes and nobody else has in any sense paid both taxes, and that the company is a person, and the only person, who can claim the relief granted by the sections from this double burden. It is submitted that this view is supported by the decision of the House of Lords in the case of the *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co., Ld.* (1)

"On behalf of the Crown it is contended that the sections require a claimant for relief to show that he has paid double tax on some part of his net total income, and that he has ultimately borne the United Kingdom tax from which he claims relief. It is argued that s. 17 of the Income Tax Act, 1918, precludes the allowance of relief in respect of any income the tax on which the claimant is entitled to charge against any other person, or to deduct out of any payment which he is liable to make to any other person, and that the contention of the Crown is supported both by the definition of 'appropriate rate' in s. 27 of the Finance Act, 1920, and by the judgments in the *Scottish Union* case (1), which depend on a consideration of the question of the incidence of the burden of the tax.

"Sect. 17 of the Income Tax Act, 1918, appears to raise a formidable objection to the company's claim, and the argument based upon it calls for careful consideration. Sect. 17 reproduces in substance a limitation contained in s. 163 of the Income Tax Act, 1842, and both in substance and in form (except for the substitution of 'claimant' for 'individual') a limitation contained in the provisions of the Finance Acts of 1907 and 1916 as to relief on earned and unearned income respectively. Sect. 163 of the Act of 1842 related to the conditions on which persons with small incomes could claim exemption from income tax, and it was subsequently applied to claims for abatement and other relief dependent on total income from all sources. For the years 1916–17 to 1918–19 the Crown cannot rely upon the form of

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(1) [1921] 1 A. C. 172

s. 17, but for this line of argument must rest upon s. 163 of the Act of 1842. Sect. 17 of the Act of 1918 does not really alter the position as regards the later years. It is one of a series of sections relating to exemption, abatement and relief dependent on total incomes. The 'claimant' referred to in s. 17, as in ss. 10 to 15, is an individual described in s. 9 who claims and proves that his total income from all sources does not exceed a specified amount. The accident that in the Act as finally printed s. 17 appears as a separate section cannot have the effect that the Consolidation Act has extended the scope of this provision to classes of claimants to whom it did not previously apply. (Historically the Report of the Joint Select Committee of both Houses of Parliament on the Bill shows that some slight hesitation was felt as to the propriety of passing these sections in the form eventually adopted, on the ground that they might conceivably effect an alteration of the law in the sense, not of extending, but of restricting, the scope of the provision reproduced, as excluding, by the substitution of the word 'individual' for the word 'person,' a possible argument, which the Committee considered to be invalid, that s. 163 might apply to corporate bodies.) The argument based on this provision has therefore no weight unless a claim under s. 43 of the Finance Act, 1916, s. 55 of the Income Tax Act, 1918, or s. 27 of the Finance Act, 1920, implies a proof of total income from all sources in accordance with ss. 163 and 164 of the Act of 1842, ss. 9 and 27 of the Act of 1918, and s. 17 of the Act of 1920. Against this suggestion may be set the generally accepted view that ss. 163 and 164 of the Act of 1842 did not apply to companies, and the reappearance of the word 'person' in s. 27 of the Act of 1920 after 'individual' had been adopted in the provisions as to proofs of total income from all sources. If these last named provisions are to be applied to claims under the Dominion income tax relief sections made by companies, it can only be by an implied analogy.

"The obscure provisions of s. 27 of the Act of 1920, as to the determination of the rate of United Kingdom income tax have no application for years prior to 1920–21. From that time onwards they raise several difficult questions as to the proper method of determining the rate appropriate to an individual. For example, what is the relation of the definition of 'rate of United Kingdom income tax' in sub-s. 8 (*d*) to the definition of 'appropriate rate' in sub-s. 1? Has 'payable' in the one the same meaning as 'has borne or is liable to bear' in the other? Has 'taxable income' in s. 27, sub-s. 8 (*d*), the same meaning as in s. 17? Does 'taxable income' in either case include or exclude income, the tax on which the claimant is entitled to charge against any other person or to deduct out of any payment which he is liable to make to any other person? Assuming, however, that the practice of determining the rate appropriate to an individual by dividing the tax ultimately borne by him by his net total income after deducting charges and the allowances granted by ss. 17 to 22 of the Act of 1920 correctly interprets the intention which the Act has failed to elucidate, and that the substantial object of these complicated provisions is to provide that in determining the appropriate rate account shall be taken of the half-rate relief which an individual can obtain on the first 225*l.* of his taxable income, we are not much helped towards a solution of our problem. In the case of a company, any rational method of determining the appropriate rate will produce the result that the appropriate rate is the standard rate, and, after all, the amount of income used as a divisor in determining the rate has no necessary relation to the income on which relief is to be given. The determination of rates is merely a preliminary proceeding; the rates when determined have to be applied to quite a different amount of income. In such a section as this, even if the meaning of taxable income were clear, there is no presumption that the word 'income' has the same meaning throughout. If it were otherwise, it might be worth notice that in determining the rate of the Federal tax on the Australian income the debenture interest is, perhaps necessarily, included in the amount of income used as a divisor.

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"The judgments in the *Scottish Union* case (1) appear, so far as they go, to be in favour of the company. The burden of tax, of which the incidence was considered, was the burden of the Colonial tax. The House of Lords was fully aware that the preference shareholders ultimately bore the burden of the United Kingdom tax, but this did not suggest any doubt as to the right of the company to claim repayment of a portion of that tax. Again in *Sheldrick* v. *South African Breweries, Ld.* (2), the right of the company to relief in respect of all its South African profits was treated as unquestionable, though s. 27, sub-s. 5, obliged it to pass on the relief so obtained to the preference shareholders. Thus in the one case the company was held to be entitled to claim and retain the relief for the benefit of the ordinary shareholders, though they did not ultimately bear the United Kingdom tax on the profits distributed to the preference shareholders, while in the other case, under the Act of 1920, the preference shareholders obtained the relief though they had not suffered any Dominion income tax.

"These decisions appear to be incompatible with the view that it is an essential condition of a title to relief that the claimant should ultimately bear both taxes, and if, apart from sub-s. 5 of s. 27 of the Act of 1920, a company could claim relief for the benefit of ordinary shareholders in respect of profits the United Kingdom tax on which was ultimately borne by preference shareholders, the fact that the United Kingdom tax was ultimately borne by debenture holders would not in itself seem to create an obstacle to relief in respect of profits applied in payment of interest to them. On the other hand the decisions are not conclusive against the argument that the income on which relief can be given must be part of the net total income of the claimant. Preference shareholders are members of the company, and there is no doubt that profits distributed to them form part of the income of the company. Debenture holders are not members of the company, and it is a debateable question whether profits applied in payment of interest to

(1) [1921] 1 A. C. 172.

(2) [1923] 1 K. B. 173.

them are or are not part of the income of the company earning them.

"We come back, then, with little or nothing to guide us, to the question whether, in applying the sections relating to Colonial or Dominion income tax relief, profits used by a company in payment of interest to its debenture holders are to be regarded as forming part of the company's income or must, for the purpose of ascertaining the amount of the company's income, be deducted from the total profits earned.

"Upon the whole there appears to be no sufficient reason for departing from the conclusion at which we arrived in a case which came before us early in 1920, though our colleagues subsequently dissented from it in a case arising under the Act of 1920, that the profits and gains on which a company has been assessed to and has paid British income tax in the first instance must be regarded as a part of the company's income for the purposes of s. 43 of the Finance Act, 1916, and that the company is entitled to claim repayment under the section if it has paid Colonial income tax on the same profits and gains, notwithstanding that those profits and gains have been partially or wholly applied to the payment of debenture interest from which the company can deduct tax; and the position seems to be the same under the Act of 1920. The decision of the Courts, though they do not amount to a direct authority, tend to support this view. The contrary contention of the Crown involves the invocation of the provisions of ss. 163 and 164 of the Act of 1842, or their equivalent, merely on the strength of the use of the words 'his income,' and it leads logically to a very narrow restriction of the possibility of relief in respect of the earnings of a company, if not indeed to the conclusion, which we cannot, and are not asked to, accept, that the sections granting relief do not apply to companies at all."

The decision of the Commissioners upon a further question in regard to the rate at which relief should be allowed on the Australian profits, which was in favour of the Crown, was accepted by the company.

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10. In accordance with the above decision the Commissioners determined that the total amount of relief allowable to the company, in terms of duty, for the years in question was as under, it being agreed between the parties that these figures were correct, if the decision of the Commissioners was right in principle :—

	£	*s.*	*d.*
1916–17	25,644	15	0
1917–18	27,142	10	0
1918–19	49,713	1	3
1919–20	55,005	7	6
1920–21	73,624	10	9
1921–22	73,274	13	4
1922–23	47,161	19	5
1923–24	50,838	6	7

11. The appellants (Commissioners of Inland Revenue) immediately upon the determination of the claim declared their dissatisfaction therewith as being erroneous in point of law, and in due course required the Special Commissioners to state a case for the opinion of the High Court, which case the Special Commissioners stated and signed accordingly.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Commissioners of Inland Revenue.

Latter K.C. and *A. M. B. Bremner* for the company.

Cur. adv. vult.

1929. Jan. 25. ROWLATT J. This case is an appeal from the decision of the Special Commissioners upon an appeal to them which was heard at a meeting of the Commissioners on February 7, 1927, with reference to the taxation of a company for eight years; the first being the year which ended in April, 1917, and the last in April, 1924.

I again feel it my duty to call attention to this gross delay. This is a question which touches not merely the rights of the individual parties, but a point which affects the affairs of many people—namely, the construction of legislation introduced in 1916—and in my judgment it is a shocking thing that these matters should drag on in this way, whether one looks at it from the point of view of the public, whose affairs cannot be settled while these questions are outstanding, or from the point of view of the Revenue authorities, who are supposed to raise from the income tax yearly a sum for the service of the current year. I have drawn attention to the delay in these matters before, but it does not do any good. On one occasion the late Lord Chancellor was informed, and apparently believed, that the delay was due to the existence of points of argument. Points of argument have been done away with; they do not touch the question. I do not say whose fault it is, or whether it is the fault of anybody, or whether the delay could be avoided. All I desire to do is to draw attention to a situation which is extremely regrettable.

The question in this case arises with reference to the relief introduced by the Finance Act of 1916 in favour of income tax payers having a source of income in a Dominion and bearing, in the first instance, double taxation—namely, both under the Dominion laws and under the laws of this country. As regards the first three years before me, the question depends upon the construction of s. 43 of the Act of 1916; as regards the fourth year, it depends upon the provisions of s. 55 of the Income Tax Act of 1918; and as regards the last four years, it depends upon the provisions of s. 27 of the Finance Act of 1920 combined with one provision in the Income Tax Act of 1918. As regards all the years, in the first instance, the point depends upon the construction of the sections giving the relief, which, to all intents and purposes, with the alteration of a word, are in the same language for this purpose. With regard to the fourth year, there is a subsidiary point whether this relief is not forbidden by s. 17 of the Act of 1918, and as regards the last four years, there is a similar subsidiary point whether it is not forbidden by that same section, but with a somewhat new flavour in it, if I may use that word, of the Act of 1920. But the first question as regards all the years is whether this relief can be obtained upon the construction of the sections giving the relief.

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Now the point is this: the company, Messrs. Dalgety & Co., Ld., are an English company, and they have a Dominion income, on which they pay Dominion income tax, and they also pay income tax upon the same income again in this country. They have an issue of debentures outstanding, and the question is whether they can claim relief upon their income less the interest which they have had to pay out of it to the debenture holders, or whether they can claim relief upon the whole income upon which, in the first instance, they pay United Kingdom income tax and have also paid the Dominion income tax; in other words, can they get back relief in respect of so much of their income as has to be devoted, and has been devoted, to the payment of their debenture interest?

Now s. 43 of the Act of 1916 does not only apply to companies, because there may be individuals who have a Dominion income of the same sort which is subject to charges. The words of s. 43 are as follows: "If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income at a rate exceeding three shillings and sixpence proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him"; and then the section proceeds to define the amount which is to be repaid. I may say at once that I do not think anything turns upon the words "any part." If the whole of the person's income falls within this section the section is equally applicable if he has paid the tax on every part of his income; and the part of his income which is referred to here has no reference at all to any part of the income which he keeps, or to the part which he has to spend in paying his debenture holders. It is not with reference to that that the word "part" is used. It means: supposing his other income is outside this region altogether that of course can be neglected for this purpose. With these observations I pass from those words altogether. Sect. 55 of the Income Tax Act, 1918, reproduced s. 43 of the Act of 1916 in the same terms so far as we are at present concerned; and s. 27, sub-s. 1, of the Finance Act of 1920 again uses the same words, except that for the word "repayment" it substitutes the word "relief"—"relief from" instead of "repayment of." As I have already said, it is upon the construction of these sections that the question in the first place turns. As throwing light upon it a great many considerations were adverted to in the argument before me, as they had been before the Commissioners, and I had the advantage in this case of a very careful judgment by the Commissioners, but I understand that other Commissioners have come to a different conclusion in another case upon the same subject-matter. Included in what was referred to before me were the decisions in certain cases dealing with the rights inter se, as regards this relief, of preference and ordinary shareholders. I do not think, however, that much assistance is gained in that way towards the elucidation of the present problem. There could never be contemplated the possibility of any claim on the part of a company to deduct its preference dividends from its taxable income, for any purpose such as the present. The preference and ordinary shareholders are not directly taxable, but are merely participants inter se in the burden of the company's tax. Charge holders or debenture holders of a company, or encumbrancers on the income of an individual, are themselves taxable as on an interest of money or annual payment, though they pay that tax by deduction when paid out of profits already taxed.

Now leaving out of consideration s. 17 of the Act of 1918, which is the section alleged expressly to forbid what the company are seeking to do here, and which does not apply in the case of all the years under discussion, the question is whether the word "income" means "income less charges." It seems to me that within the four corners of s. 43 of the Act of 1916, and s. 27, sub-s. 1, of the Act of 1920, and s. 55 of the intermediate Act of 1918, there is a clear indication of what the answer must be. The enactments award repayment and relief where tax is twice levied on the same income.

Now income charged with interest payments only bears double tax in so far as it exceeds the interest paid out of it, and such income in so far as it exceeds the interest paid out of it alone seems to be within the purpose of the section, and is therefore, in my judgment, alone what is described by the word "income" as used therein. To give an allowance outside the scope of the grievance in view is foreign to the very nature of a relieving section.

On this short ground, and without discussing the bearing of s. 17 in the case of the fourth year, or the last four years, I think the Crown are entitled to my judgment. But I cannot refrain from pointing out the difficulties which would result from giving effect to the contention of the company. If that contention is correct they would receive back or get allowed part of the tax deducted from the debenture interest. I know of no provision under which they would hold that deducted tax for the Crown, but if they did we should arrive by a circuity at the same result as if they failed in their claim to deduct the interest when arriving at their income—namely, the claim now in question. If, however, they can retain this sum, what is the position ? Suppose a debenture holder or a charge holder, if it is not the case of a company, has an income below the exemption limit, can he obtain repayment of the full tax when the Crown has not received it, or has he no right to recover it and so loses his exemption in part when he is clearly entitled to it ? There is no provision whereby the company must pass on to him the relief obtained such as exists for preference shareholders under s. 27, sub-s. 5, of the Act of 1920, which varied the consequences which flowed from s. 43 of the Act of 1916, as decided in the *Scottish Union* case. (1)

If this is the extraordinary position as regards the debenture holder, what, on the other hand, is the position of a company ? They would have this repaid tax and could divide it in dividend to an extent corresponding to the interest they had paid, even though their income had been insufficient to pay the interest in full ; and we should behold a company in the position of paying a dividend though they had not paid their debenture interest in full, in fact, paying the two concurrently. And when they paid the dividend they would either deduct a sum for income tax or they would not. If they did, they would deduct tax which they had not paid, for repaid income tax cannot be a profit or gain itself taxable, and the shareholders, if below the exemption limit, could not get it back. If, on the other hand, they did not deduct it the shareholders would get a dividend, not tax free in the common use of that phrase, but immune from tax and outside of income tax altogether.

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(1) [1921] 1 A. C. 172.

The difficulty in this case is undoubtedly to justify cutting down the word "income" so as to read it as "income less charges." One is not entitled to cut down the meaning of a plain word so as to give it what one thinks is a more reasonable effect, or to provide for what one thinks is a casus omissus. When, however, one finds, as in the present case, that to give a word its unrestricted meaning leads to results which fundamentally pervert the clearly intended object of the section, and, further, cannot be fitted into the other parts of the scheme of the tax, it seems to me that in giving effect to these considerations one is only doing what was done in *Colquhoun* v. *Brooks* (1), as set forth in the famous judgment of Lord Herschell.

For these reasons I think the Crown succeeds in respect of all the years in question.

Appeal allowed.
Judgment for Crown.
R. F. S.

The company appealed. The appeal was heard on May 2, 3, 6 and 7, 1929.

Latter K.C. and *A. M. B. Bremner* for the company. The company is entitled to pay income tax at a reduced rate in respect of all profits which have borne Dominion income tax, including profits applied in paying interest on debentures.

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(1) (1889) 14 App. Cas. 493, 502.

It has "paid" Dominion income tax in respect of these profits, and it is irrelevant that in paying the interest on debentures it is entitled to deduct income tax at the full United Kingdom rate. Deduction of income tax from interest on debentures was originally made under the Income Tax Act, 1842, s. 102, and s. 163 gave the only rebate then in existence. It is important to notice that it was thought necessary in that section to make an express exception, providing that the exemption was not to extend to "so much of such duties as the person claiming such exemption shall or may be entitled to charge against any other person, or to deduct or retain from or out of any payment to which such claimant may be or become liable." A similar exception is re-enacted in the Finance Act, 1916, s. 26, sub-s. 4, in connection with a grant of further relief, and in s. 17 of the Income Tax Act, 1918. No similar provision has ever been made in regard to the relief in respect of profits that have already paid Dominion income tax. This relief was first granted by the Finance Act, 1916, s. 43, and it is important to notice that the express exception in s. 26, sub-s. 4, of that Act was not made to extend to the relief under s. 43. So too no such express exception is introduced in regard to similar relief accorded by the Income Tax Act, 1918, s. 55, or the Finance Act, 1920, s. 27, sub-s. 5, to pass on the benefit of the reduced rate of United Kingdom income tax. This sub-section was passed as the result of the decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) It did not apply to interest on debentures, and the Income Tax Act, 1918, All Schedules Rules, rr. 19, 20, 21, provided for deduction of the income tax from debenture interest of income tax at the full rate.

The word "income" in the relevant sections of the Income Tax Act, 1918, and the Finance Acts 1916 and 1920, means "taxable income," and in the present case the total profits and gains of the company before any deduction is made for payment of the debenture interest. The word "paid" in the same sections must be construed in its natural sense and not as meaning "borne." The latter point is concluded by the decision in the *Scottish Union* case. (1) It was there contended that the company had not paid tax because it had only passed it on, but it was held that the company might pass on the whole of the United Kingdom income tax without the remission of the 1*s.* 6*d.* allowed to it. Here the company has paid both United Kingdom income tax and Dominion income tax, and is entitled to deduct the United Kingdom income tax at the full rate from the interest payable to the debenture holders. It is the company and not the debenture holders who have paid the tax: see also *Sugden* v. *Leeds Corporation.* (2)

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(1) [1921] 1 A. C. 172.

[LORD HANWORTH M.R. referred to *Inland Revenue Commissioners* v. *Blott.* (3)]

As regards the argument of the Crown, that the express prohibition in s. 163 of the Act of 1842 and in s. 17 of the Act of 1918 precludes the company from obtaining the reduction, it is submitted that those sections have no application to the present case. They apply only to the case of an individual who claims an abatement on the ground that his total income does not reach a specified amount.

[They also referred to *Mylam* v. *Market Harborough Advertiser Co.* (4)]

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown. The main argument in this case is on the interpretation of the word "income" in s. 27 of the Finance Act, 1920. That section is one which gives relief against double taxation, but the tax must first be paid in order that relief may be claimed. The relief claimed in the present case is in respect of United Kingdom income tax, and the question is what do the words "his income" in s. 27 of the Act of 1920 mean? Do they mean "taxable income" or "income less charges"? It is submitted that the latter is the correct meaning: *Gittus* v. *Inland Revenue Commissioners.* (5) "Income," it is submitted, means a man's real income—namely, that which remains in his pocket after he has paid all charges upon it: *Shanks* v. *Inland Revenue Commissioners* (1); *London County Council* v. *Attorney-General* (2); *Earl Howe* v. *Inland Revenue Commissioners.* (3)

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(1) [1921] 1 A. C. 172.
(2) [1914] A. C. 483.
(3) [1921] 2 A. C. 171.
(4) [1905] 1 K. B. 708.
(5) [1921] 2 A. C. 81, 87.

It is submitted that in respect of the debenture interest the company has not "paid" the United Kingdom income tax because it has recovered it all back again.

It is inconceivable that the income to be released by reason of the payment of Dominion income tax differs from the income used for ascertaining the appropriate rate of income tax. That appropriate rate is ascertained under the Finance Act, 1920, s. 27, sub-s. 8 (*d*), by reference to the amount of "taxable income." This expression is defined in s. 17 as the total income less the deductions set out in the five following sections. The test whether the company is entitled to relief from double taxation turns on whether it has effectively paid double income tax. In so far as it has paid United Kingdom income tax on profits or gains applied in payment of interest on debentures, it has paid as a conduit pipe only. The position in regard to shareholders is quite different: see *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (4) and *Gold Fields American Development Co.* v. *Consolidated Gold Fields of South Africa.* (5) "Paid" in the Finance Act, 1920, s. 27, sub-s. 1, cannot be construed literally, for it must include "deductions." The true meaning is "effectively paid or suffered." In the case of debentures of a company the expenses of the company in paying Dominion income tax are immaterial. The debenture holders' right to fixed interest is not diminished by the payment. The distinction between debentures and shares is recognized by s. 27, sub-s. 5. The company is a corporate body, and must pass on any relief it receives to its corporators, but that has no application to debenture interest. The debenture holders must suffer deduction of full United Kingdom tax.

(1) [1929] 1 K. B. 342, 361.
(2) [1901] A. C. 26, 42.
(3) [1919] 2 K. B. 336, 347.
(4) [1921] 1 A. C. 172.
(5) [1926] Ch. 338, 355.

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That double tax must have been effectively paid is borne out by *Rolls Royce, Ld.* v. *Short.* (1) It receives support too from the meaning to be attributed to " taxable income " in the Act of 1920, which prevents that part of the total income from being taken into account under s. 27, which by virtue of the relief given to all incomes has not borne United Kingdom tax. It is to be noted that in s. 27 the word " income " is used and not " profits or gains." If a person has profits or gains of 5000*l.*, but is liable to pay an annuity of £1000, his income would really be 4000*l.* and not 5000*l.* This is made clear by r. 3 of the Rules applicable to Cases I. and II. of Sch. D, which by r. 3 (*l*) artificially increases the income by allowing no deduction in respect of " any annual interest, or any annuity, or other annual payment payable out of profits or gains." So too in the All Schedules Rules, rr. 19, 21, the reference is to " any interest of money, annuity or any other annual payment," recognizing that they are not part of the income of the person paying them, and that they are collected by deduction when possible only as a matter of convenient machinery. " Income " therefore in s. 27 of the Act of 1920 does not mean " profits or gains brought into charge."

Again it is sought to cut down the meaning of s. 17 of the Income Tax Act, 1918, by reference to s. 163 of the Income Tax Act, 1842. It is true that s. 163 only applied in a very limited sense, and it may be that as the Act of 1918 is a consolidating Act s. 17 must be treated similarly as applying only to Part III. of that Act and not to s. 55. But when relief from double income tax was given by the Finance Act, 1920, s. 27, that Act provided by s. 64, sub-s. 1, that Part II. (which included s. 27) should be construed together with the Income Tax Acts. Therefore s. 27 takes its place in the combined Acts as one of the allowances to which s. 17 applies. The result would be that if respondents failed on their general contention, they would still be right in regard to the last four years in question. In support of this view it is to be observed that s. 17 of the Act of 1918 originally

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(1) (1925) 10 Tax Cas. 59.

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dealt only with any "exemption or abatement," but this was altered by Sch. III. of the Act of 1920 to "any allowance or deduction."

Latter K.C. replied.

Cur. adv. vult.

June 6. The following written judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. given on January 25, 1929, whereby he reversed the decision of the Commissioners, who had decided in favour of Messrs. Dalgety & Co., Ld. From this decision the Crown appealed to Rowlatt J., who gave judgment in favour of the Crown, and from his decision Messrs. Dalgety & Co., Ld., have appealed to this Court.

The case raises some intricate and difficult questions of income tax law. Messrs. Dalgety & Co., Ld., are a company incorporated in England under the joint stock company's Act, who carry on business both in Australia and New Zealand. Income tax is paid in both those Dominions upon the profits earned by the company in them, and also in the United Kingdom upon the same profits. The company, consequently, claimed the relief which is given by the Income Tax Acts to those who pay both Colonial income tax and United Kingdom income tax.

There are assessments in eight successive years in respect of which the relief is claimed—namely, the years ending April 5, 1917–1924; but the sections under which the relief is claimed are not the same in every year. Relief from United Kingdom income tax in case of the payment of Dominion income tax upon the same profits was first given by s. 43 of the Finance Act, 1916. That section applies to the three several years ending April 5, 1917, 1918, 1919. Then s. 55 of the Income Tax Act, 1918, which came into force on April 6, 1919, applies to the relief claimed in respect of the year ending on April 5, 1920, and s. 27 of the Finance Act, 1920, applies to the last four years, 1921, 1922, 1923, 1924. Sect. 43 of the Finance Act, 1916, and s. 55 of the Income Tax Act, 1918, are in pari materia. Sect. 27 of the Finance Act, 1920, expands the terms and method of the relief given into eight sub-sections. It is possible that different considerations may therefore apply to the first four years in which the relief is given by the simpler section, and the latter four years to which more elaborate provisions apply. The authorized capital of the company during the eight years in question consisted of 200,000 ordinary shares of 20*l.* each, on all of which 5*l.* per share had been paid up, and 100,000 preference shares of 10*l.* each, of which 50,000 have been issued and are fully paid. The company has also issued debentures and debenture stock—hereinafter called debentures—which amounted to approximately 2,500,000*l.* during the relevant years. By the terms of the debentures the principal of, and interest upon, them were secured upon the whole undertaking and assets of the company. The business of the company is that of general merchants, shipping, and insurance agents and bankers. Apart from dividends, which are taxed by deduction, and income from property, which is charged to income tax under Sch. A, practically the whole of its income arises from trading profits earned by trading operations in Australia and New Zealand. The control of the company is exercised in England, and consequently all these trading profits are assessed to United Kingdom income tax, and, as already stated, Dominion income tax has also been paid upon these same profits in Australia and New Zealand before they are remitted to London.

The Commissioners allowed the full relief claimed. That relief was cut down, but not refused altogether, by the judgment of Rowlatt J. No question arises upon the figures in the case. The sole point in dispute is whether the sum on which relief given to the company because of it having paid Dominion income tax is to be calculated on the whole amount of the profits earned by it in Australia and New Zealand, and on which both income taxes have been paid, or only on the balance of these profits remaining, after deducting from them the sum required out of them to pay the interest on its debentures, which could not be provided and paid out of the company's income arising in the United Kingdom.

It is agreed that the income arising in the United Kingdom should be considered to have been used in the first place, and pro tanto, in satisfaction of the interest on the debentures. This income did not suffer payment of Dominion income tax, so no question arises about it in the present case. The question is whether relief should be allowed in respect of the additional sum out of the trading profits remitted from the Dominions and which has suffered Dominion income tax and was needed to pay the balance of the debenture interest. Some simple figures will make the point clear. For the year ending April, 1919, debenture interest had to be paid to the amount of 104,065*l.* That interest was in part satisfied by taxed dividends and Sch. A profits—home profits they may be called—to the extent of 48,820*l.*, leaving a further sum to be provided for the payment of the debenture interest: 104,065*l.* – 48,820*l.* = 55,245*l.* This sum was provided out of the total profits of 419,269*l.*, which came over here from the Dominions and was taxed there; but the Revenue authorities refuse to allow relief from Dominion income tax upon this particular sum, although they do allow relief upon the remainder of the profits so remitted after deduction of the sum used to pay the balance of the debenture interest: in figures 419,269*l.* – 55,245*l.* = 364,024*l.* It is not disputed that the whole sum of 419,269*l.* had paid Dominion income tax and also United Kingdom income tax. But the contention of the Crown is that the company has not in truth and in fact paid the two taxes upon part of it—namely, upon this sum of 55,245*l*—because the company when it paid or distributed that sum to the debenture holders deducted—as it was required to do under the Acts—income tax upon these payments of interest, and was so to speak recouped, or at any rate cannot be said to have paid, the United Kingdom income tax on these sums, which total 55,245*l.*

It is important, therefore, to consider the principle on which deductions of income tax are made from payments of interest and the effect of them. The provision for them is now embodied in the All Schedules Rules, rr. 19, et seq., under the Income Tax Act, 1918, which replace previous enactments in the same sense. Rule 19, in short, provides that where any yearly interest of money is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid. There are a number of ancillary provisions. Rule 20 deals with the profits and gains of a company which are to be computed before any dividend is made to the shareholders. Rule 21 deals with the position when the payment of the annual interest is made not out of, or not wholly out of, profits or gains brought into charge. In that case it is specifically provided that the person making the payment is to hand over to the Inland Revenue the amount so deducted which was not provided out of profits or gains that had been brought into charge; and under rr. 22 and 23 provision is made for the settling of disputes as to the deductions made or to be made, and for a penalty if the person to whom the interest is payable refuses to allow the deduction for the tax. From these rules it is clear that: (*a*) the tax so deducted is the tax that ought to be paid by the person entitled to the interest; (*b*) no assessment is made upon the person entitled to the interest, and that the system of deduction—in other words, payment at the source—is adopted in respect of his liability; (*c*) an express provision is made as to when the person making the payment subject to the deduction of the tax is to render an account and hand over the deductions to the Crown—that is, when the interest paid is provided out of moneys not charged, or not wholly charged to tax; (*d*) but that when the interest is paid out of profits and gains brought into charge to tax, in that case the person making the payment or interest is entitled to deduct and retain thereout the sum that represents the tax deducted; (*e*) the person making the deduction "shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." At one time it was suggested that a company so paying income tax on its profits and deducting it from interest on dividends paid to its shareholders was acting as agent for its shareholders. That view is dispelled by the speech of Lord Cave in *Inland Revenue Commissioners* v. *Blott* (1), where he says that "no agency, properly so called, is involved." This is clear, I think, if one keeps in mind that the company is a taxpayer and has to pay income tax on its profits before deductions, and that the person entitled to the yearly interest of money is also a separate taxpayer independently liable to pay his tax.

So far, therefore, upon consideration of these rules, it would seem that the contention of the company is correct. There is no agency. The tax deducted is the tax that is due from the person to whom the interest is paid, and no set-off, unless specially provided and indicated, can arise between the tax paid by the company and the tax payable by a wholly different taxpayer. Further, the provision for handing over the tax collected does not apply to the present case at all.

The question raised is not in respect of the payment of dividends as to which special legislation has been provided. Sect. 27, sub-s. 5, of the Finance Act, 1920, in terms provides that the relief obtained in respect of the payment of Dominion income tax shall be passed on to the shareholders,

(1) [1921] 2 A. C. 171, 201.

and that the deduction made from any payment of dividend to them shall not exceed "the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." We are here considering a payment of interest to debenture holders which is of a different nature from the distribution of dividends to the shareholders, and is not specially dealt with anywhere, as is the income tax deducted from any dividends in sub-s. 5. It is an expense which has to be met out of the profits or gains. There is a specific prohibition against the allowance of any deduction of such an expense in the ascertainment of profits : see r. 3 (*l*) of the Rules applicable to Cases I. and II. of Sch. D.

The effect of the sections to which I have referred, or their predecessors, was considered in *London County Council* v. *Attorney-General*. (1) The point that arose for decision was whether the right to retain the tax deducted prevailed in the circumstances of that case. Some interest upon stock was provided out of moneys which had paid tax under Sch. A, and not under Sch. D. Sect. 24 of the Act of 1888 contained three words which are omitted from r. 21 : "and not payable, or not wholly payable, out of profits or gains brought into charge to such tax." The argument was that such tax meant income tax under Sch. D, and did not include tax paid under Sch. A. That argument was held unsound by the House of Lords, and the "deductor" was held entitled to retain the sum equivalent to the tax deducted. Lord Davey in his speech considering this right of deduction says (2) : "It is not open to doubt, and was not disputed, that ss. 60 and 102 alike mean that the person paying the yearly interest may deduct and retain the amount of the tax for his own benefit, and the scheme of the Act is so far clear and is in favour of the taxpayer," and later on, "therefore, the Crown receiving the tax on the whole income, in the first instance, from the owner, has no further claim against the mortgagee or annuitant, on whose account the owner is deemed to have paid as well as on his own." Summing it up (1): "I hold that the London County Council are entitled to retain for their own benefit so much of the deduction made by them from the interest paid by them to their mortgagees in respect of income tax as is equal to the income tax paid by them on their real estate under Sched. A, or, which comes to the same thing, to account to the Crown only for the deducted income tax on so much of the interest as is not paid out of their income which has already been taxed." These passages make it clear that the tax deducted is paid on quite a different account from that of the deductor—namely, the taxpayer who is entitled to have the interest paid to him; and, further, that the right to retain the tax deducted is one which is given clearly and ought to be enforced in favour of the deductor. Further, in *Sugden* v. *Leeds Corporation* (2), Lord Haldane L.C. said: "But the Acts give him the right to deduct the tax due from the recipient in respect of the annual payments, and, as he has himself already paid tax on the whole profits, to retain for himself the amount so deducted." The case of the *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (3) supports this view. It overruled the decision of Astbury J. in *Rover* v. *South African Breweries* (4), who had refused to accept the proposition that the company's tax and the shareholder's tax are two distinct things. It is pointed out in the *Scottish Union* case (3) that it is the company, and the company only, who could qualify for relief by paying the two income taxes in the Dominion and in the United Kingdom. Lord Finlay (5) does not accept the proposition that the company were agents for the shareholders in the payment of the Dominion tax. The case appears to negative the view that the company can only deduct the net amount of the United Kingdom tax after deduction of the sum obtained by way of relief therefrom.

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(1) [1901] A. C. 26.

(2) [1901] A. C. 42.

Rowlatt J. has felt the difficulty that arises upon the plain terms of the sections giving relief, all of which begin: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax." The words "by deduction or otherwise" are of no significance in this connection. They merely embrace among those who are to have the relief those who have paid the tax by deduction as well as those who have paid directly. Can the word "paid" be cut down, or altered, so as to mean borne; or to effect the same result can the words "in respect of the same part of his income" be read as "in respect of the same part of his income less charges"? Rowlatt J. adopts the latter course under the authority of the speech of Lord Herschell in *Colquhoun* v. *Brooks*. (1) In that case the Court of Appeal (2) held the operation of the statute to be limited to what that Court thought it ought to deal with, and no more, and that it did not include "an absolutely foreign trade." The decision was affirmed in the House of Lords (1), but the reasoning of the Court of Appeal was not accepted. The ratio decidendi of the House of Lords was that the interpretation put upon the wide words of the charging section must be cut down in view of the absence of machinery to carry into effect the larger, though possible, meaning. This question of the absence of machinery is important. It is a strong step to give such a construction to an Act of Parliament as necessitates some alteration of its wording, and that because of a preconceived notion of what the statute was intended to mean and effect: see Lord Sterndale's observations on this subject in *Sheldrick* v. *South African Breweries*. (3) He rejects an interpretation for which good reasons were offered by counsel to explain what the Legislature must have intended, and he bases his decision "upon the plain words of the sub-section which I think, are not equivocal and which, if they do not convey the intention of the Legislature, should be altered by the Legislature so as to express what it did intend." The same difficulty as to machinery arises in the present case if the solution adopted by Rowlatt J. is accepted, for it was forcibly pointed out by Mr. Latter that there is no machinery provided whereby the income less charges is to be arrived at for the purposes of the relief sections. I, therefore, reject an interpretation which requires machinery that is not provided in accordance with the decision of the House of Lords in *Colquhoun* v. *Brooks.* (1)

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(1) [1901] A. C. 45.
(2) [1914] A. C. 483, 490.
(3) [1921] 1 A. C. 172.
(4) [1918] 2 Ch. 233.
(5) [1921] 1 A. C. 172, 182.

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(1) 14 App. Cas. 493, 502.

(2) (1888) 21 Q. B. D. 52.

(3) [1923] 1 K. B. 173, 184, 185.

The other argument is that "paid" in the relief sections connotes not merely payment but "paid and borne." On this head it is to be noted that the words "borne or is liable to bear" are actually found in sub-s. 1 of s. 27 of the Act of 1920, the section which at present gives and has developed the scheme of giving relief owing to the payment of Dominion income tax. Those words were necessary to deal with the proper estimation of the United Kingdom income tax, in view of the modern system of excusing payment upon certain allowed portions of income and other reliefs that have been allowed in the assessments for the United Kingdom tax. But though the words are found in the very sub-section, the commencement of the section still remains: "If any person who has paid." It would surely, if the Legislature had meant it, have been easy to have introduced words and made the section run: "If any person who has paid and borne." Again sub-s. 5 was introduced to alter the effect of the decision in the *Scottish Union* case. (2) It provides that the deduction from dividends paid shall be "at the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." That sub-section by its express terms is not intended to cover the present case, for the inclusive definition given immediately before sub-s. 5 applies only to sub-s. 4. In my judgment, therefore, it is not possible to alter the section and read "paid" as equivalent to "paid and borne."

There remains the question whether the relief claimed is barred by s. 17 of the Income Tax Act, 1918. On this point I accept the careful reasoning of the Commissioners, and do not desire to add to it more than to state this by

(1) 14 App. Cas. 493, 502.

(2) [1921] 1 A. C. 172.

way of reinforcement of their view. If s. 17 bars the relief, then this argument carries the Attorney-General too far. It would forbid too much. I think s. 17 must be read in its proper setting, and as referring to exemption and abatements (now " allowance or deduction "), which belong to that part of the Act where it is found. There may be difficulties caused by s. 64, sub-s. 1, of the Finance Act, 1920, and construing Part II. of that Act " with the Income Tax Acts " ; but I cannot hold that the relief given by s. 27 of that Act of 1920 is to be nullified instanter by s. 17 of the Income Tax Act, 1918, contrary to the plain words of s. 27, words which for the reasons I have given must, in my judgment, be interpreted as they stand, to mean what they say.

The appeal must be allowed with costs here and below and the decision of the Commissioners restored.

LAWRENCE L.J. This appeal raises a question which is not free from difficulty—namely, whether the relief in respect of Dominion income tax to which the company is entitled ought to be calculated on the whole amount of its profits earned in the Dominions or only on the balance of such profits after deducting therefrom so much of the interest paid by it on its debentures as its income arising in the United Kingdom was insufficient to meet.

The facts which have given rise to this question have been fully stated by the Master of the Rolls, and there is no need to repeat them.

Mr. Latter contended that the company, having paid United Kingdom income tax on the whole of its income earned in the Dominions, and having also paid Dominion income tax in respect of the same income, is entitled to relief on the whole amount of such income, and that its right to this relief is not affected by the fact that the company was entitled to deduct and has in fact deducted United Kingdom income tax on payment of the debenture interest.

The Attorney-General on the other hand contended that as the company had deducted the United Kingdom income

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tax from the debenture interest and had therefore not ultimately borne such tax it had not in fact "paid" such tax within the meaning of the relevant sections of the Income Tax and Finance Acts; further, that in so far as the profits of the company were applied in payment of the debenture interest they were not "income" of the company within the meaning of those sections; and lastly, that in respect of the four years ending on April 5, 1924, the company (by virtue of s. 17 of the Finance Act, 1918) was not entitled to relief in respect of income, the tax on which it was entitled to deduct from any payment made by it to its debenture holders.

The case is somewhat complicated by the fact that the relief claimed by the company extends over a period of eight years, and that different enactments apply to different parts of that period. The question we have to decide, however, turns mainly on the true meaning of the words "any person who has paid by deduction or otherwise United Kingdom income tax on any part of his income," which occur in each of the three relevant sections—namely, s. 43 of the Finance Act, 1916; s. 55 of the Income Tax Act, 1918; and s. 27 of the Finance Act, 1920.

The first point to be determined is whether "income" in those sections means "taxable income" or "income less charges."

As a general rule the word "income" is used in the Income Tax Acts to denote "taxable income": see (amongst other instances pointed out by Mr. Latter) s. 164 of the 1842 Act and s. 27, sub-s. 1, of the 1918 Act. In the former section the expression is "the income of such claimant" and in the latter "his income," and in both cases the taxable income and not the income less charges is obviously meant. There are no doubt instances in the Income Tax Acts where the context clearly shows that "income" means "income less charges," especially in those sections which deal with exemption from or abatement of income tax dependent upon the claimant's total income from all sources, in which cases however there is usually found a provision that relief is not to be granted in respect of any income the tax on which the claimant is entitled to charge against any other person.

In my opinion there is nothing in the context in any of the relevant sections to indicate that the word "income" is intended to mean anything other than the income in respect of which the claimant has to pay income tax. No machinery is provided for ascertaining the net income going into the pocket of the person claiming relief in respect of Dominion income tax, such as is to be found in the provisions giving relief dependent upon small incomes or upon the claimant's total income from all sources.

The Attorney-General placed some reliance on the complicated provisions of s. 27 of the 1920 Act dealing with the ascertainment of the appropriate rate of income tax for the purpose of arriving at the amount of the relief, as showing that the word "income" in the relevant sections means "income less charges." I agree with the Commissioners that the obscure provisions of that section as to the appropriate rate of the United Kingdom income tax (which were inserted for the first time in the 1920 Act) do not have the effect of cutting down the meaning of the word "income" in the relevant sections of the earlier Acts nor in the earlier part of s. 27 of the 1920 Act. The appropriate rate, however ascertained, becomes the standard rate, and the amount of the income used as a divisor in determining that rate bears no necessary relation to the income on which relief is to be given.

On the whole therefore I am of opinion that the Commissioners were right in their view that "income" in the relevant sections means "taxable income."

The next question is whether the company has "paid" the United Kingdom income tax within the meaning of the relevant sections. The sections give relief to the person who has paid both the United Kingdom income tax and the Dominion income tax in respect of the same income. If that person can show that he has paid the double tax he has satisfied all the requirements of the sections and is entitled to the relief. The relief is from United Kingdom income tax and not from Dominion income tax.

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The Attorney-General contended that "paid" in the context in which it is found means "ultimately borne." On this point I think that useful guidance is to be obtained from the decision of the House of Lords in the *Scottish Union* case. (1) In that case the relief had been granted by the taxing authority, and the question to be decided was as to the incidence of the burden of the tax as between the preference shareholders and the ordinary shareholders. The case therefore affords no assistance on the question whether profits applied in payment of debenture interest are or are not part of the "income" of the company earning them, as both the rival claimants were members of the company and the profits distributed amongst them undoubtedly formed part of the income of the company, whereas debenture holders are creditors and not members of the company. On the question of the meaning of the word "paid," however, the case has in my opinion a distinct bearing. The preference shareholders ultimately bore the burden of the full United Kingdom income tax on the dividends paid to them, and yet this fact apparently did not suggest any doubt either to the taxing authority or to the Court as to the right of the company to claim repayment of a portion of that tax for the benefit of the ordinary shareholders who had not borne any part of it.

The effect of this decision in so far as it affects shareholders is got rid of by s. 27, sub-s. 5, of the 1920 Act, and in *Sheldrick's* case (2) the preference shareholders were held entitled to the benefit of the relief, although they had not borne the burden of the Dominion income tax. On the question whether the relevant sections were intended to operate only in those cases in which the ultimate burden of the double tax should happen to fall on the same person I can see no distinction in principle between the case of a company deducting the tax from the preference dividends and the case of a company deducting the tax from the debenture interest, except that, under the 1920 Act, the company in the former case is bound to pass on the relief it obtains to its shareholders.

(1) [1921] 1 A. C. 172.

(2) [1923] 1 K. B. 173.

Applying the principle underlying the decisions in the two cases I have mentioned to the point now under consideration I can see no valid ground why a company should not obtain for the benefit of its shareholders relief in respect of the double tax paid by it merely because the burden of the United Kingdom income tax on the debenture interest was ultimately borne by the debenture holders.

The company has in the natural and literal sense paid both the United Kingdom income tax and the Dominion income tax. No one else has paid or become liable to pay both these taxes, and no one else can claim relief under the relevant sections. The company is not bound to pass on this relief to the debenture holders. There is nothing in the various Acts to require the company, as a condition of obtaining relief, to show that it will ultimately have to bear the burden of the United Kingdom income tax which it has paid and from which it claims relief. The Legislature has not provided any means for enabling the taxing authority to ascertain on whom the burden of the United Kingdom income tax paid by the company will ultimately fall, and in my opinion the obvious inference to be drawn from the absence of any such provisions is that the taxing authority is not concerned with that question.

For these reasons I am of opinion that the contention of the Crown that "paid" means "ultimately borne" is not well founded.

There remains the question as to the effect of s. 17 of the 1918 Act. The substance of this section appeared first in s. 163 of the 1842 Act. It reappeared in sub-s. 5 of s. 19 of the 1917 Act and finally in s. 17 of the 1918 Act.

The enactment in question applied at first to the exemption from income tax of persons with small incomes and subsequently to abatements and other reliefs dependent upon the total income from all sources of individuals. The Attorney-General was therefore constrained to admit that this enactment could only apply, if at all, to the last four years of the period under review, that is to say after the coming into force of the 1920 Act.

The Attorney-General based his contention on the grounds: (1.) that, by virtue of s. 64 of the 1920 Act, Part II. of that Act (in which s. 27 is to be found) was to be construed together with the Income Tax Acts, and (2.) that the word "relief" was used for the first time in s. 27 instead of the word "repayment," which occurred in the earlier enactment.

In my judgment this contention fails. Although one ought not to be surprised at anything contained in the Income Tax and Finance Acts, I agree with Mr. Latter that it would be most startling if an alteration in the law seriously affecting a large class of taxpayers were to be brought about by any such method.

In my judgment the plain answer to the contention of the Crown is that s. 17 of the 1918 Act is one of a series of sections relating to exemption, abatement and relief depending upon total income from all sources and has nothing to do with relief in respect of Dominion income tax; that the word "claimant" in s. 17 (as in the preceding ss. 10 to 15) means the individual described in s. 9, who claims and proves that his total income from all sources does not exceed a certain amount; and lastly, that s. 27, sub-s. 5, of the 1920 Act shows that s. 17 of the 1918 Act does not apply to relief in respect of Dominion income tax, as it provides for the passing on of such relief in cases where the company is entitled to deduct and retain United Kingdom income tax from payments made to its shareholders.

For these reasons, which are substantially those given by the Commissioners, I am of opinion that s. 17 of the 1918 Act does not preclude the company from obtaining relief under s. 27 of the 1920 Act in respect of any income the United Kingdom income tax on which it is entitled to deduct and retain out of any payment of debenture interest.

In the result the appeal succeeds and should be allowed with costs.

SANKEY L.J. The appellants are an incorporated company whose business is that of general merchants, shipping and insurance agents and bankers. Apart from dividends, which are taxed by deduction, and income from property, which is charged to income tax under Sch. A, practically the whole of its income arises from trading profits earned by trading operations in Australia and New Zealand, but as the control of the company is exercised in England, such trading profits are all assessed to United Kingdom income tax under Case I. of Sch. D. Dominion income tax has also been paid on such trading profits arising in Australia and New Zealand. They have a Dominion income, and they pay Dominion income tax upon that income. They also pay income tax again in England, and they have an issue of debentures outstanding. The question is whether they can claim relief upon their income, less the interest which they have had to pay out of it to the debenture holders, or whether they can claim relief upon the whole income upon which in the first instance they directly pay United Kingdom income tax and have also paid the Dominion income tax.

It must be added that in paying their debenture interest the company pay such interest less the United Kingdom income tax. The relief claimed extends over a period of years 1916–1923, and as regards the first three years it depends upon the construction of s. 43 of the Finance Act, 1916. As regards the fourth year it depends upon s. 55 of the Income Tax Act, 1918, and as regards the last four years it depends upon s. 27 of the Finance Act, 1920.

With regard to the fourth year there is a point as to whether this relief is not forbidden by s. 17 of the Income Tax Act, 1918, and as regards the last four years there is a similar point as to whether it is not forbidden by that same section. Relief in respect of United Kingdom income tax, where a person had already paid a Colonial income tax, was originally granted by the 1916 Act, was continued from year to year, and is now regulated by the code contained in s. 27 of the 1920 Act.

There are verbal differences between these various sections, which however do not in my opinion affect the point at issue, which depends upon the proper construction of s. 27 of the 1920 Act. It is not necessary for me to read that section again; it is a long section, and has been frequently read in the course of the case. The real question for determination is, have the appellants paid within the meaning of s. 27 of the 1920 Act and the other cognate sections United Kingdom income tax on any part of their income upon which they have also paid Colonial income tax?

In order to answer this question properly the meaning of two words "paid" and "income" has to be determined. (1.) Has the company "paid" United Kingdom income tax, (2.) on any part of its "income"?

The appellants say they have paid, because they have in fact, to use a neutral word, handed over the amount of the tax to the Crown. The Crown say that the appellants have not paid, because, although they have handed over the amount to the Crown, they have deducted it from the debenture interest, and that they are not entitled to the relief claimed because they have not borne the burden.

The real question after all is the meaning of the word "paid" upon which the meaning of the word "income" may shed some light. It would be a strange result if on a true interpretation of the section relief were granted where there had been, as in this case, no burden; but if that be the proper interpretation of the section the Court must give effect to it however much they may feel their decision would defeat the real object of Parliament.

In construing Income Tax Acts one must not forget the canon to be employed. The Court is not to be guided so much by the objects, which it thinks such Acts are to achieve, as by considering whether the words of the Act have reached the alleged subject of taxation. This construction was laid down with great clearness in two cases by Lord Halsbury L.C. In *Lord Advocate* v. *Fleming* (1) he said, in dealing with such Acts: "We have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted." In *Tennant* v. *Smith* (2), an earlier case, he said: "In a taxing Act it is impossible, I believe, to

(1) [1897] A. C. 145, 152. (2) [1892] A. C. 150, 154.

assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

What then is the meaning of the word "paid"? It must be given its natural and primary meaning rather than an artificial and ultimate meaning. If, for example, A. and B. owe C. 10*l.* and A. hands over a 10*l.* note to C., A. has paid C., and none the less because he can get back 5*l.* from B. So too a person has paid income tax, although subsequently to the payment he may be entitled to get it back, because he was not liable to pay the particular amount. In such a case the fact of payment is one of the conditions precedent to relief.

Over and above this, this Court at any rate is bound by authority as to the meaning of the word "payment." In *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) it is stated that the United Kingdom income tax was paid by the company, but the argument for the appellants (2) was that the company had not in fact paid United Kingdom income tax on its profits brought into charge. It appears therefore that the question whether it had paid or not was directly involved, and the above argument was rejected. Lord Finlay for example says (3): "The company has, in fact, paid the United Kingdom income tax, and it is the company that is entitled to the repayment received." In these circumstances both reason and authority compel us to hold that the company in the present case

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(1) [1921] 1 A. C. 172, 174.

(2) [1921] 1 A. C. 176.

(3) [1921] 1 A. C. 184.

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have paid the tax. Rowlatt J. in his judgment says: "The enactments award repayment and relief where tax is twice levied on the same income," and in the present case the tax has been twice levied on the same company, and the consideration that the company have charged the tax against the debenture holders does not alter the fact that the tax has been levied on the company.

What is the meaning of the word "income"? That word is used in many collocations in the Income Tax Act and various Finance Acts, as for example "total income from all sources"; "earned income"; "total income for purposes of the super tax." It is however always necessary to consider not generally what its meaning is, but what is its meaning in the particular place in which it finds itself. I think the word here must mean "taxable income"—that is the whole income upon which the tax is levied, which included the debenture interest: see Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 3 (*l*), which provides that annual interest is not to be deducted in computing the amount of the profits or gains to be charged. In my view s. 17 does not refer to relief granted in respect of United Kingdom income tax where a person has already paid Dominion income tax. Historically that section is the direct descendant of s. 163 of the Income Tax Act, 1842. The fact that it appears in a rather different place in the Income Tax Act, 1918, cannot make it apply to a relief to which it was not meant to apply when such relief was originally granted, still less to a relief which was not in terms granted till two years later. In my view the argument is best put by the Commissioners in the present case as follows: "Sect. 17 reproduces in substance a limitation contained in s. 163 of the Income Tax Act, 1842, and both in substance and form (except for the substitution of 'claimant' for 'individual') a limitation contained in the provisions of the Finance Acts of 1907 and 1916 as to relief on earned and unearned income respectively. Sect. 163 of the Act of 1842 related to the conditions on which persons with small incomes could claim exemption from income tax, and it was subsequently applied to claims for abatement and other relief dependent on total income from all sources. . . . . The 'claimant' referred to in s. 17, as in ss. 10 to 15, is an individual described in s. 9 who claims and proves that his total income from all sources does not exceed a specified amount. The accident that in the Act as finally printed, s. 17 appears as a separate section, cannot have the effect that the Consolidation Act has extended the scope of this provision to classes of claimants to whom it did not previously apply."

I am therefore of opinion that the appeal should be allowed, with costs.

Appeal allowed.

Solicitors for appellants: *Bircham & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

THOMPSON *v.* LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY.

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May 14.

[1928. T. 293.]

Railway—Negligence—Accident to Railway Passenger—Negligence of Railway Company—Damages—Excursion Ticket—Special Contract—Condition negativing Company's Liability—Passenger unable to read—Reasonable Notice of Condition.

The plaintiff, who could not read, had an excursion ticket taken for her by her niece on the face of which were printed the words: "Excursion. For conditions see back"; and on the back was a notice that the ticket was issued subject to the conditions in the defendant company's time tables and excursion bills. On the excursion bills excursion tickets were stated to be issued subject to the conditions shown in the company's current time tables. The time tables, which could be obtained for sixpence each, stated: "Excursion tickets . . . . are issued subject to the general regulations and to the condition that the holders . . . . shall have no rights of action against the company . . . . in respect of . . . . injury (fatal or otherwise) . . . . however caused." A special jury found that an accident to the plaintiff on the journey covered by the excursion ticket was due to negligence on the part of the defendant company. To prevent the case going back for a new trial, the jury were asked whether the defendant company took reasonable steps to bring the conditions to the notice of the plaintiff and answered "No," and awarded damages. Argument was then allowed whether the jury could so find,

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and it was held that as a matter of law when the ticket was accepted the contract was complete, and therefore there was no evidence on which the jury could find as they did:—

Held, that the fact that the plaintiff could not read did not alter the legal position; that she was bound by the special contract made on the excursion ticket on the acceptance of the ticket; and that the indication of the special conditions by reference to the time tables was sufficient notice of their existence and contents.

Stewart v. *London and North Western Ry. Co.* (1864) 33 L. J. (Ex.) 199 applied.

Parker v. *South Eastern Ry. Co.* (1877) 2 C. P. D. 416 distinguished.

Nunan v. *Southern Ry. Co.* [1923] 2 K. B. 703 approved.

Held, also, that the question put to the jury for the sake of convenience as to reasonable notice must be determined upon the law applicable to the conditions upon which the ticket was issued, and that those conditions negatived the right of the plaintiff to recover damages.

Watkins v. *Rymill* (1883) 10 Q. B. D. 178 followed.

APPEAL from Mr. Commissioner Sir W. F. Kyffin Taylor sitting at Manchester with a special jury.

The action was brought by Mrs. Mary Elizabeth Thompson against the defendant company for damages in respect of injuries sustained by her through alleged negligence of the defendant company's servants.

The following statement of facts is taken from the judgment of the Master of the Rolls :—

"Mrs. Thompson went with two other persons, the two other persons being her daughter and her niece, a Miss Aldcroft, on January 21, 1928, to the railway station, and she was a passenger on a train from Manchester to Darwen, the train reaching Darwen at about 10 P.M. at night. When the train arrived at Darwen station it apparently was too long to be accommodated at the platform, with the result that it had to pull up a second time. The plaintiff was told not to get out at the first stopping of the train. Then the train drew up a second time, and when it reached the platform it reached that part of it right at the end of the platform where the ramp begins, and in stepping out on to the platform she slipped and suffered the injuries which are set out in the statement of claim. The action is brought and is based on the negligence of the defendants in the course of carrying the plaintiff to her destination—Darwen from Manchester. The defendants rely upon the conditions of the contract under which they undertook to convey the plaintiff from Manchester to Darwen, and the particulars say this: The ticket issued to the plaintiff by the defendants for the said journey was an excursion ticket and on the face of the said ticket were printed (inter alia) the words 'Excursion, For conditions see back,' and on the back of the said ticket were printed (inter alia) the words 'Issued subject to the conditions and regulations in the company's time tables and notices and excursion and other bills.' On the excursion bill of the said company were printed (inter alia), the words 'Excursion tickets are issued subject to the notices and conditions shown in the company's current time tables.' In the company's time table were printed (inter alia) the words 'Excursion tickets and tickets issued at fares less than the ordinary fares are issued subject to the general regulations and conditions and also the condition that neither the holders nor any other person shall have any right of action against the company . . . . in respect of . . . . injury (fatal or otherwise) loss, damage or delay however caused.'

"There is no dispute that this lady was travelling by an excursion train. It is an excursion train which apparently the defendant company run so many times a week during particular periods of the year between Darwen and Manchester and Manchester and Darwen. The excursion train is run on terms of a much lower charge being made to passengers than is charged for the ordinary transit. The excursion trains are not part of their ordinary service of trains—they are trains on special days and special occasions and on special terms as to price. There is some evidence as to how the lady came to travel. She says in her evidence she cannot read; she paid a Miss Aldcroft, who was one of the ladies of the party, the sum which was required, and Miss Aldcroft says this (this is the learned Commissioner's note): 'I took tickets —three half-day excursions to Manchester 2*s.* 7*d.* each'— that is from Darwen to Manchester and Manchester back to Darwen. Now the price 2*s.* 7*d.* each is just one-half of what would be charged as the ordinary fare for that amount of railway travelling between Darwen and Manchester and back again from Manchester to Darwen. She says at that time nothing was said about handbills and nothing about conditions and she saw no handbill, but on cross-examination she says her father had been to see if there were excursion trains, and there is in the evidence (according to the note which has been very sensibly and very fairly agreed between junior counsel in the case) this statement, which does not find its way into the condensed note which is before me, that he had looked and found that there were excursion trains as indicated by some of the bills which were hanging up in the booking hall of the railway company.

"The lady's action was tried before Mr. Commissioner Sir William Francis Kyffin Taylor sitting at Manchester with the assistance of a special jury of Manchester men, and he left certain questions to the jury. The first question that had to be decided was, Whether or not there was any negligence on the part of the defendants? and the second was, What were the damages if they held that the defendants were liable? Then came the question of a special defence which had been argued on the particulars that I have already read. On that issue the learned Commissioner took a course which has been taken before and taken prudently in order to prevent the case going back for a new trial. He says in his summing up to the jury: 'I want to leave a question to you about this condition. . . . . Did the defendants, the railway company, take reasonable steps to bring the conditions to the notice of the plaintiff? It may be that that question is not necessary, but I think it wiser, in order to save expense and trouble, to get an answer from you at any rate if you would be good enough to bring your minds to bear upon it.' It is I think quite plain from that introductory sentence that the learned Commissioner left that question not because he was satisfied in his mind that there was evidence which required or justified the question being put, but ex majore cautela so that it might be considered and the answer of the jury considered if it became necessary to do so. The jury in answer to that question replied as follows: they answered No, they had not taken steps, and then they found on the other two questions

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for the plaintiff, that is, they found negligence and they found damages to the amount of 167*l.* 10*s.* The learned Commissioner at a later date rightly had the legal question arising upon the issue of that condition argued before him and ultimately came to the conclusion that the condition did afford a shield of defence to the railway company, and upon that he entered judgment for the defendants. It is from that judgment for the defendant railway company that the plaintiff appeals."

The appeal was heard on May 14, 1929.

N. B. Goldie K.C. and *B. R. Rice-Jones* for the appellant.

Jackson K.C. and *W. Gorman* for the respondent company.

The arguments sufficiently appear from the judgments.

[The following cases were referred to: *Skrine* v. *Gould* (1); *Williamson* v. *North of Scotland and Orkney and Shetland Steam Navigation Co.* (2); *Richardson, Spence & Co.* v. *Rowntree* (3); *Hood* v. *Anchor Line (Henderson Brothers)* (4); *Nunan* v. *Southern Ry. Co.* (5); *Watkins* v. *Rymill* (6); *Marriott* v. *Yeoward Brothers* (7); *Hearn* v. *Southern Ry. Co.* (8); *Stewart* v. *London and North Western Ry. Co.* (9); *Harris* v. *Great Western Ry. Co.* (10); *Grand Trunk Ry. Co of Canada* v. *Robinson* (11); *Parker* v. *South Eastern Ry. Co.* (12)]

LORD HANWORTH M.R. This case has raised a very interesting point, not the less interesting because it is not new, but we have had the advantage of an able argument on both sides, from Mr. Goldie and Mr. Jackson, and we feel no difficulty in coming to a conclusion.

[His Lordship stated the facts as above set out and continued:] The learned Commissioner has come to his conclusion upon a ground which we are of opinion was right.

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(1) (1912) 29 Times L. R. 19.
(2) 1916 S. C. 554.
(3) [1894] A. C. 217.
(4) [1918] A. C. 837.
(5) [1923] 2 K. B. 703.
(6) 10 Q. B. D. 178.
(7) [1909] 2 K. B. 987.
(8) (1925) 41 Times L. R. 305.
(9) 33 L. J. (Ex.) 199.
(10) (1876) 1 Q. B. D. 515.
(11) [1915] A. C. 740.
(12) 2 C. P. D. 416; (1876) 1 C. P. D. 618.

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Dealing with the condition, I must just say a word or two more as to its nature. The ticket issued to the plaintiff had in plain and unmistakable terms in type as large as the other words upon the face of the ticket: "Excursion, For conditions see back." There is no difficulty in reading those words any more than there is a difficulty in reading the words "Third Class" or "Manchester" down below. Then on the back of the ticket is printed also in type, which if small is easily legible: "Issued subject to the conditions and regulations of the company's time tables and notices and excursion and other bills. Return as per bill." In the time table at p. 552 there is this condition, which is relied upon and which I have read. The condition on the back makes the first reference to the company's time tables, but it also refers to notices and excursion and other bills. In the excursion bills, which contain some notes as to the tickets to be issued and the charges to be made and the dates on which passengers can travel at a single fare for a double journey, there is a reference to the conditions and the inquirer is directed to the time table. Ultimately therefore the time table is the place where this particular condition is found. Any person who took the trouble to follow out the plain and legible words on the ticket, "See Conditions," would be directed without difficulty to the source of the conditions and would be able to find it. Obviously persons who are minded to go for a day journey of this sort do not take the trouble to make an examination of all the conditions, but two things are plain, first, that any person who takes this ticket is conscious that there are some conditions on which it is issued and also, secondly, that it is priced at a figure far below the ordinary price charged by the railway company, and from that it is a mere sequence of thought that one does not get from the railway company the ticket which they do provide at the higher figure of 5*s*. 4*d*.

The plaintiff in this case cannot read; but, having regard to the authorities, and the condition of education in this country, I do not think that avails her in any degree. The ticket was taken for her by her agent. The time of the train was ascertained for her by Miss Aldcroft's father, and he had made the specific inquiry in order to see at what time and under what circumstances there was an excursion train available for the intending travellers. He ascertained, therefore, and he had the notice put before him before ever the ticket was taken, that there were conditions on the issue of excursion and other reduced-fare tickets.

It appears to me that the right way of considering such notices is put by Swift J. in *Nunan* v. *Southern Ry. Co.* (1) After referring to a number of cases which have been dealt with in the Courts he says: "I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him." In law it seems to me that that is right. The railway company is to be treated as having made an offer to intending travellers that if they will accept the conditions on which the railway company make the offer they can be taken at suitable times, on suitable days and by indicated trains from Darwen to Manchester and back at a price largely reduced from the common price; but upon certain conditions which can be ascertained, and of the existence of which there can be no doubt, for they are indicated clearly upon the ticket which is issued.

Whether or not the father of Miss Aldcroft took the trouble to search out the conditions, or to con them over or not, it appears to me that when that ticket was taken it was taken with the knowledge that the conditions applied, and that the person who took the ticket was bound by those conditions.

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(1) [1923] 2 K. B. 703, 707.

If that be so, the conditions render it impossible for the plaintiff to succeed in her action. It is, however, argued that it is a question of fact for the jury, whether or not sufficient notice was given of these conditions, and whether or not, therefore, the plaintiff ought to be held bound by the conditions; for it is said that the conditions are, I will not say past finding out, but difficult to ascertain. The learned Commissioner who tried the case appreciated that the verdict of the jury was based probably on the fact that you have to make a considerable search before you find out the conditions. I think he is right in saying that in the line of cases, and there are many, under which this case falls, it has not ever been held that the mere circuity which has to be followed to find the actual condition prevents the passenger having notice that there was a condition.

Starting as early as 1864, there is a case of *Stewart* v. *London and North Western Ry. Co.* (1), a decision of the Court in banc, in which it was held that the holder of a railway excursion ticket—expressed to be "issued subject to the conditions contained in the company's time and excursion bills," one of which conditions was that "luggage under 60 lb." should be carried "free, at passenger's own risk"—was bound by the terms of this special contract, which was not void under the Traffic Act; and he had consequently no claim against the company for the loss of his luggage, although it was proved that he did not know the condition on which it was being carried. The learned Chief Baron, Pollock C.B., in that case, says (2): "There is a rule in the English law that every man must be taken to know that which he has the means of knowing, whether he has availed himself of those means or not. Now, as to this ticket, the plaintiff must be supposed to have read it. If he did not choose to consult the handbill, that is his fault, not the fault of the company. The bill points out the terms upon which these particular and special trains are to run." And then he refers to the condition, and says (3): "The plaintiff's

(1) 33 L. J. (Ex.) 199.
(2) 33 L. J. (Ex.) 200.
(3) 33 L. J. (Ex.) 201.

ignorance, then, was of his own creation, and the luggage was lost in a place where he has agreed to take the risk himself. Under the circumstances, the railway company are not liable, and on that ground there should be no rule." And then the other judges concurred. I have referred to that case not only because it is the earliest one to which our attention has been called in matter of date, but also because it refers to an excursion train. It appears to me important to bear in mind that we are dealing with a special contract made for a special transit by an excursion train. We are not dealing with the ordinary schedule of trains available to every one at the usual rate. We are dealing with a particular transit, in respect of which the father of Miss Aldcroft went down to the station to know if and when such transit was available, and ascertained both the time and the price; and he could have learned all the conditions if he had been so minded.

That consideration, that it was an excursion train and a special contract, must be borne in mind; for there are a number of cases which, if you do not bear that in mind, might be taken as applying and applying in a contrary sense to the present case. For instance, I think that in dealing with *Parker* v. *South Eastern Ry. Co.* (1) it must be remembered as regards the condition which was there relied upon as to limitation of liability in respect of goods deposited in a cloak room, that the limit there arose upon a ticket which had been handed to the depositor; but it was unnecessary for the purpose of the deposit and the safe custody that there should be any terms or conditions at all, or indeed, that there should be a written contract at all. Therefore, the contract was one which could be made, and might very ordinarily be made, without any written conditions of any sort or kind; and that feature is dwelt upon as significant in the judgment of Lord Coleridge C.J. in the Court below, where he says (2): "Regard being had to the common and ordinary course of business, it seems to me to be reasonable that a man receiving such a ticket as this should look upon it as a mere voucher

(1) 1 C. P. D. 618; 2 C. P. D. 416. (2) 1 C. P. D. 618, 626.

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for the receipt of the package deposited, and a means of identifying him as the owner when he sought to reclaim it," and in that sense not containing any special condition to which his attention was to be drawn. And in the Court of Appeal observations are made which must be taken with that qualifying factor arising upon the issue of the ticket. Bramwell L.J. (as he then was) there says (1): "Would the depositor be bound ? I might content myself by asking : Would he be, if he were told 'our conditions are on this ticket,' and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand. I am of opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said: 'Read that, it concerns the matter in hand'; that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected."

Now there is the present case. It was quite clear, and everybody understood and knew that there would have to be a ticket issued. Without such ticket, which is the voucher showing the money has been paid, it would not be possible for the lady to go on the platform to take her train, or on reaching the end of her transit to leave the platform without giving up a ticket. It is quite clear, therefore, that it was intended there should be a ticket issued; and on that ticket plainly on its face is a reference made to the conditions under which it is issued.

The question then remains, the judge having left this question to the jury, and the jury having found it in favour of the plaintiff, ought that verdict upon that question to be set aside ? Mr. Goldie has said that there was some evidence on which the question was properly left to the jury—namely, the fact that the condition was somewhat far to seek, and could not have been immediately discovered by the person taking the ticket. I agree with the observations of the learned Commissioner, Sir William Francis Kyffin Taylor, upon that point. I cannot find that the question of difficulty or delay in ascertaining the condition has been relied on in any of the cases as making any difference.

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(1) 2 C. P. D. 416, 428.

The observations rightly dwelt upon by Mr. Goldie, made by Lord Haldane in *Hood* v. *Anchor Line* (*Henderson Brothers*) (1), were in a case where there was a question of fact open and to be determined by the tribunal. But if the question is whether there is any evidence to support the findings of fact that is a matter of law, and we must give effect to the law. It does not avail that the jury have answered the question put to them in favour of the plaintiff, for the putting of that question to them was otiose.

Now it appears to me that this point is exactly dealt with in *Watkins* v. *Rymill* (2) in the judgment delivered by Stephen J., in which he said (3): "The only question which can be called a question of fact is, whether giving a man a printed paper plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission is or is not equivalent to asking the owner of the carriage to read that paper, with intent that he should read it when he has a fair opportunity of doing so. This, we think, is a question of law, to be answered in the affirmative." So here the giving of the ticket in plain terms indicated that there are conditions, and that one of the conditions is that the person shall find them at a certain place and accept them, and that is I think quite a plain indication that the carrier has made that offer upon those terms and conditions only, and that any answer that he had not brought the conditions sufficiently to the notice of the person accepting the offer must be set aside as perverse.

Following, therefore, the judgment in *Watkins* v. *Rymill* (2) it appears to me that the learned Commissioner who dealt with this question here was quite right in saying that he could not give effect to the answer of the jury upon the

(1) [1918] A. C. 837.

(2) 10 Q. B. D. 178.

(3) 10 Q. B. D. 178, 190.

question that he put for reasons of convenience; and that this must be determined upon the law applicable to the conditions upon which the ticket was issued; and that those conditions negative the right of the plaintiff to recover.

For these reasons the appeal must be dismissed with costs.

LAWRENCE L.J. Notwithstanding the able argument of Mr. Goldie, I am of opinion that this appeal fails. The question to be decided is whether there was any evidence upon which the jury could find that the railway company did not take reasonable steps to bring to the notice of the appellant the conditions on which she would be carried. Now the appellant was, I think, entitled to insist that all that was reasonably necessary as a matter of ordinary practice should have been done to bring to her notice the fact that the contract tendered to her when she paid her fare excluded her right of action in respect of injury, fatal or otherwise, however caused. Whether all that was reasonably necessary to bring that condition to her notice was done is a question of fact: see per Lord Haldane in *Hood* v. *Anchor Line* (*Henderson Brothers*). (1) In the present case the learned Commissioner has held that there was no evidence to the contrary.

The facts of the case are simple. On the ticket issued to the plaintiff's agent there was a statement in plain terms that it was issued subject to conditions which would be found on the back, and on the back there is a plain statement indicating where the conditions subject to which the ticket was issued were to be found. In these circumstances (the notice on the ticket not being tricky or illusory) it seems to me that there is no room for any evidence that the company had not done all that was reasonably necessary as a matter of ordinary practice to call attention to the conditions upon which the ticket was issued. Mr. Goldie strenuously contended that as the condition upon which the company now relies was of an unusual character in that it exempted the company from its ordinary liability, special attention ought to have been drawn to that condition. In my judgment, that argument is not sound; if it were, the company would have to draw attention not only to the condition upon which it now relies, but to all the conditions which might become material according to the events which might afterwards happen, and that could not as a matter of ordinary practice be done upon a ticket such as this or verbally at the ticket office.

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(1) [1918] A. C. 837, 844.

It seems to me that the right view is the one which was expressed by Bramwell L.J. in *Parker* v. *South Eastern Ry. Co.* (1) in the passage to which the Master of the Rolls has referred. If there were a condition which was unreasonable to the knowledge of the company tendering the ticket I do not think the passenger would be bound. Here it cannot be said that the condition in question in this case is an unreasonable one, either from the point of view of the company or from that of the passenger. It is a condition, as appears from *Stewart* v. *London and North Western Ry. Co.* (2), which has existed in respect of excursion trains for upwards of half a century, and is, to my mind, a reasonable condition, which need not have special attention directed to it. I therefore agree with the learned Commissioner that there was no evidence upon which a jury could properly have found that the company had not taken reasonable steps to bring to the attention of the appellant notice of the condition upon which it was going to carry her between Manchester and Darwen on the occasion in question.

I agree with the Master of the Rolls that this appeal ought to be dismissed.

SANKEY L.J. I agree, if I may be permitted to say so, with what Lord Dunedin says in *Hood* v. *Anchor Line (Henderson Brothers)* (3): "This is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say 'Hear the conclusion of the whole matter,'" and I think Mr. Goldie was quite right in saying

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(1) 2 C. P. D. 416, 428.
(2) 33 L. J. (Ex.) 199.
(3) [1918] A. C. 837, 846.

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that *Parker* v. *South Eastern Ry. Co.* (1), which has been approved in every case since its date, really stereotyped the question which a tribunal always must put to itself when the question arises. The learned Commissioner did put a third question here: "Did the defendant railway company take reasonable steps to bring the condition to the notice of the plaintiff?"

Now those who practise in this class of case know perfectly well the sort of considerations which are placed before juries when they are asked to give a verdict and an answer to that question. In some of the cases the ticket has been handed to the plaintiff folded up, and it has been suggested to the jury that that fact shows that the defendants did not take reasonable steps to bring the conditions to the notice of the plaintiff. In the earlier cases you will find examples of an argument which has long since been abandoned, where it was sought to be said that where the conditions were printed at the back of the ticket instead of upon the front of the ticket, the jury ought to say that there the defendants had not taken reasonable steps to bring the conditions to the notice of the plaintiff. There is still a third class of case. If you look at the authorities you will find that the attention of the jury has been called to the smallness of the print, and it is said: "Oh yes, the print was so small that no reasonable person could read it," and the jury have been asked to say on that consideration that reasonable steps have not been taken by the defendants to bring the conditions home to the notice of the plaintiff, especially, as it is put in some of the cases, if when you take the ticket for an excursion train, somebody behind you is of the opinion that you are taking too long to get the ticket and hustles you out of the ticket office before you have time to see. No doubt all those are matters for the consideration of the jury. But in this present case I think rather a different state of affairs is involved. There can be no question here about the size of the print, at least I do not understand that Mr. Goldie (who, if he will permit me to say so, argued the case very well) takes any point with regard to the size of the print; I do not think so. If he had, I should have disagreed with him for the reasons pointed out by my Lord the Master of the Rolls; it is in quite big print and quite legible print, "For conditions see back." Now when you look at the back it is not possible I think to say merely because the condition was not printed upon the front that it did not give reasonable notice. There again the print, although smaller, is legible, and refers to the notices, excursion and other bills and to the time tables.

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(1) 2 C. P. D. 416.

As I understand it the real point made by Mr. Goldie, and I rather expect the point upon which the jury really gave their verdict, was this: "Well, what we have to consider is this, that the conditions do not in fact appear upon the ticket at all either on the front or the back but they do appear in a document—namely, the time tables, which it is extremely difficult to get." There was evidence that there was only (I think) one copy in the booking office, and that you had to pay 6*d.* to get a copy if you wanted to see for yourself, and it is suggested: "Ah, well now, that is not giving reasonable notice of the conditions." I do not quite agree with that. I rather think that this is a class of case where you make a contract in one document which clearly refers to conditions and incorporates conditions which are contained in another document, and if you do make a contract like that I do not think it is open to you to say either: (1.) that you did not in fact look at the document which contained the incorporated terms; or (2.) that the document which contained the incorporated terms was one which you might have had some difficulty in finding. The fact remains that you had made a contract which clearly says that the conditions are contained in a particular document. Now I cannot help thinking that the jury thought it was because of the difficulty in getting the time table or the bills that the company had not taken reasonable steps to bring the condition to the notice of the plaintiff. That I understand is where the learned Commissioner disagrees with the verdict of the jury. He says, and I should like to read the passage again: "I do not think

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myself that in the line of cases under which I hold this case falls, that does make any difference"—that is to say the consideration whether you have to make a considerable search before you find the conditions. "It does not prevent the passenger having notice that there are conditions in writing, and that they are the conditions on which the company makes the offer, and if there is a written offer which refers to conditions which are to be found in a document, which if you like you can search, it seems to me that the person accepting the offer is bound by the conditions and that in such a case there is no evidence such as would come within those authorities upon which a jury could say that reasonable steps had not been taken by the company to bring the conditions to the notice of the person purchasing the ticket." I would like to guard myself in the way that Bramwell L.J. and my brother Lawrence L.J. have guarded themselves with regard to the question whether if the document to which you are referring imposed such unreasonable conditions that nobody could contemplate that they exist, you could be bound by them. The example given was supposing you left in a cloak room goods bound by conditions in a time table, and there were conditions in the time table that if you did not remove your goods within twenty-four hours they should be forfeited to the railway company or that you should pay 100*l.*, or some ridiculous condition like that; in my view the conditions would not be binding. Supposing again the conditions in the time table were printed in Chinese, so that you could not understand them, there again it probably could not be said you would be bound by the condition, but the present condition is by no means an unreasonable condition; everybody familiar with the practice of the railway world knows the sort of conditions that are imposed upon people who take cheap tickets—sometimes they are drovers' tickets, sometimes they are tickets to enable workmen to go backwards and forwards, sometimes they are excursion tickets, and in respect of the latter tickets, in *Stewart* v. *London and North Western Ry. Co.* (1), to which we have been referred,

(1) 33 L. J. (Ex.) 199.

in addition to the passage read from the judgment of the Chief Baron, Pigott B. said (1) (it was an excursion train) he looked upon it as a special contract; that it was competent for the parties to make it, and the railway company did not incur the responsibility of common carriers in running these excursion trains. In those circumstances I do not think that it was open to the jury to find that the company had not taken all reasonable steps to give the plaintiff notice of the conditions. The case proceeds on a different line altogether, and I am of opinion that the learned Commissioner was right in entering judgment for the defendants non obstante veredicto.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *John Carnegie, for C. St. J. Broadbent, Darwen.*

Solicitor for respondents: *Alexander Eddy.*

(1) 33 L. J. (Ex.) 201.

W. I. C.

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STANYFORTH *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—"Conveyance or transfer operating as a voluntary disposition inter vivos"—Resettlement of Real Estate—Overriding Power of Revocation and New Appointment—"Value of the property conveyed or transferred"—Defeasible Estate in Remainder—Method of Valuation—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 74, *sub-ss.* 1, 5.

By a deed of resettlement dated in 1911 Lord P. the first tenant for life and H. the second tenant for life of the P. estates in exercise of a power of revocation and new appointment reserved to them by a settlement of 1870, partially revoked the trusts therein contained and made certain fresh appointments the effect of which was to diminish the interests taken by Lord P.'s son C. thereunder and to increase those taken by his son G. The resettlement preserved to the appointors the power of revocation and new appointment reserved by the deed of 1870. In considering the amount of the stamp duty payable on the resettlement under s. 74 of the Finance (1909–10) Act, 1910, the Inland Revenue Commissioners found that the resettlement conferred a substantial benefit under sub-s. 5 of s. 1 of the Act on the persons who took benefits thereunder and valued the property transferred at 1,990,700*l.* by taking the market value of the property as a whole at the time of the conveyance and deducting therefrom the value of the interests thereby preserved or restored, and they assessed the amount of the stamp duty at 19,907*l.* In making this valuation the Commissioners disregarded the existence of the power of revocation and new appointment reserved to Lord P. and H. On appeal by the trustees of the resettlement Rowlatt J. affirmed the decision of the Commissioners. On appeal:—

Held, by Lord Hanworth M.R. and Slesser L.J. (Lawrence L.J. dissenting), affirming the decision of Rowlatt J., that the case was covered by the decision in *Earl of Westmorland* v. *Inland Revenue Commissioners* [1928] 1 K. B. 703, notwithstanding that the power of revocation and new appointment in that case was contained in the operative deed itself, and that the Commissioners having proceeded on a right principle the Court would not interfere.

Held, by Lawrence L.J., that the case was distinguishable on the facts from *Earl of Westmorland* v. *Inland Revenue Commissioners* [1928] 1 K. B. 703, and that the Commissioners by disregarding the power of revocation and new appointment had valued the property conveyed or transferred by the deed on the footing that it consisted of an indefeasible estate in remainder whereas it was in fact a defeasible estate in remainder.

Case stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891.

1. The opinion of the Court was desired as to the stamp duty chargeable on an instrument which had been presented to the Commissioners of Inland Revenue on behalf of the

appellants Colonel Edwin Wilfred Stanyforth, C.B., and the Hon. Egremont John Mills (hereinafter called "the appellants," the present trustees for the purposes of the Settled Land Act of the Portman family settled estates) or their predecessors in title under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which it is chargeable.

2. The instrument in question (hereinafter called "the resettlement") was a deed poll dated September 16, 1911, under the hands and seals of the Rt. Hon. William Henry Berkeley, second Viscount Portman (who died on October 16, 1919), and the third Viscount Portman, then the Hon. Henry Berkeley Portman, who was at the date of the deed poll the eldest surviving son of the second Viscount Portman, and who died on January 18, 1923.

3. The resettlement was a deed of revocation of certain uses estates or limitations and new appointment of certain other uses estates or limitations of freehold property of great value in London, Middlesex, Dorset and elsewhere (forming the Portman family estates) and the capital moneys representing the proceeds of sale of part of the London and Middlesex settled estates and liable to be invested in the purchase of land to be made subject to the subsisting uses of the London and Middlesex settled estates.

4. Immediately prior to the resettlement the London, Middlesex and Dorset settled estates forming part of the Portman family settled estates (together with certain other estates in Somerset and Devon which were dealt with by the resettlement but in respect whereof no claim for ad valorem stamp duty as hereinafter appearing had been made) stood limited subject to certain jointures and family charges and powers of charging and other powers including powers of revocation and new appointment by deed which were reserved to the second Viscount Portman and the Hon. Henry Berkeley Portman as hereinafter appearing to the following uses successively—namely:—

(1.) to the use of William Henry Berkeley, second Viscount Portman for life, (2.) to the use of the Hon. Henry Berkeley Portman, afterwards third Viscount Portman for life,

(3.) to the use of the first and other sons of the Hon. Henry Berkeley Portman successively according to seniorities in tail male,

(4.) to the use that if the Hon. Claud Berkeley Portman (the second surviving son of the second Viscount Portman and the present fourth Viscount Portman) or any son of his should become entitled in possession under the following limitation the Hon. Gerald Berkeley Portman (the fourth surviving son of the second Viscount Portman) during his life and after his death his eldest surviving son during his life should receive a yearly rentcharge of 5000*l.* and subject thereto,

(5.) to the use of the Hon. Claud Berkeley Portman for life,

(6.) to the use of the first and other sons of the Hon. Claud Berkeley Portman successively according to seniorities in tail male,

(7.) to the use that if the Hon. Seymour Berkeley Portman the third surviving son of the second Viscount Portman should succeed to the title he should receive for life a yearly rentcharge of 4000*l.* and subject thereto,

(8.) to the use of the Hon. Gerald Berkeley Portman for his life,

(9.) to the use of the first and other sons of the Hon. Gerald Berkeley Portman successively according to seniorities in tail male,

(10.) divers uses over in remainder.

5. By the resettlement the second Viscount Portman and the Hon. Henry Berkeley Portman, in whom jointly the above mentioned power of revocation was vested, in exercise of that power revoked the uses identified above by the numbers (4.) to (10.) and appointed new uses, effecting the changes hereinafter specified but in other respects restoring the interests previously subsisting but subject as hereinafter mentioned.

6. The settlement of the settled estates as altered by the resettlement differed from the settlement subsisting

immediately before the execution of the resettlement in the following respects—namely, under the resettlement the Hon. Claud Berkeley Portman took in the place of his life interest in the London and Middlesex Estates (including investments representing proceeds of sale of parts of those estates) a life rentcharge of 50,000*l.* charged on those estates, and the sons of the Hon. Claud Berkeley Portman took in the place of their successive estates in tail male in the London, Middlesex and Dorset estates successive estates for life or in tail male in a rentcharge of 50,000*l.* charged on the London and Middlesex estates and except to the extent of the said rent-charge of 50,000*l.* a year the limitations of the London and Middlesex estates which under the former settlement took effect in remainder after the successive life estate and estates in tail male of the said Claud Berkeley Portman and his sons respectively were advanced and replaced by life estates or estates in tail male taking effect in succession immediately after the estates for life and in tail male of the Hon. Henry Berkeley Portman and his sons respectively, and the limitations of the Dorset estate which under the former settlement took effect in remainder after the estates in tail male of the sons of the Hon. Claud Berkeley Portman were advanced and replaced by estates for life or in tail male taking effect in succession immediately after the life estate of the said Claud Berkeley Portman, the effect being to accelerate the interests of the subsequent remaindermen as if the life estate or estates in tail male of the said Claud Berkeley Portman and his sons had, to the extent mentioned, been surrendered in favour of the remaindermen.

8. The appointment effected by the resettlement was made subject and without prejudice as to all the hereditaments thereby appointed or as to such of them as were affected thereby respectively to the uses and estates which preceded the use or limitation in favour of Claud Berkeley Portman and his assigns during his life and to the powers (including all powers of revocation and new appointment which powers were thereby preserved and were intended to override all the uses powers and provisions created by the resettlement) and

privileges and trusts to such precedent uses and estates respectively annexed or exercisable during the continuance or by virtue thereof.

9. The powers of revocation and new appointment above referred to were reserved or created by an indenture dated June 27, 1870, and made between the late Right Hon. Edward Berkeley, first Viscount Portman, and the second Viscount Portman (then the Hon. William Henry Berkeley Portman) of the one part and Henry Beilby William Milner and the Hon. George Henry Cavendish of the other part. The said powers had been preserved by two deeds of partial revocation and new appointment dated March 13, 1906, and January 25, 1909, under the hands and seals of the second Viscount Portman and the late Edward William Berkeley Portman.

11. The Commissioners were of opinion that the resettlement conferred a substantial benefit on the persons (other than Claud Portman and his male issue) who took interests thereunder in remainder expectant on the determination or failure of the uses referred to in para. 4 of the Case as numbers (1.) (2.) and (3.) and that the resettlement operated as a voluntary disposition inter vivos within the meaning of s. 74 of the Finance (1909-10) Act, 1910, of the London Middlesex and Dorset estates and the capital moneys representing the proceeds of sale of part of the London and Middlesex estates subject to the estates therein of the second Viscount Portman and Henry Berkeley Portman and his male issue and was subject to ad valorem duty accordingly.

12. The Commissioners were further of opinion that in arriving at the value of the property conveyed or transferred (by reference to which the stamp duty under the last mentioned section was chargeable) the overriding powers of revocation and new appointment were to be disregarded and such value was to be arrived at by deducting from the agreed value of the estates in possession—namely, 7,454,174*l.*, the values of the estates either preserved or restored by the resettlement. The value of the property conveyed, as appearing from the figures stated in the Case, was 1,990,700*l.*,

and equalled the difference (arrived at on the basis of a fair distribution of the market value of the estate as a whole among the persons entitled to the several estates and interests therein) between what Claud Berkeley Portman had (1.) before and (2.) after the resettlement, which difference was by the resettlement transferred from Claud Berkeley Portman and his issue to other persons.

13. It was agreed between the appellants and the Commissioners and their respective actuaries that if the overriding powers of revocation and new appointment were to be disregarded and if the method adopted in the Case was the correct method of arriving at the value of the property conveyed for the purpose of s. 74 of the Finance (1909–10) Act, 1910, then the value of the property conveyed or transferred by the resettlement was 1,990,700*l.* The Commissioners, accordingly, assessed the duty, with which the resettlement was chargeable, at 19,907*l.* ad valorem duty under s. 74 of the Act of 1910, and 10*s.* the fixed duty in respect of the rest of the operation of the resettlement. The duty as assessed was paid under protest on February 6, 1928.

14. No objection was taken by the appellants to the fixed duty of 10*s.*, but the appellants contended, first, that the resettlement being subject to the overriding powers of revocation and new appointment was at the material date an ambulatory document and was not a disposition within the meaning of s. 74 of the Act of 1910, and, secondly (if that first contention was wrong), that in valuing the property conveyed or transferred by the resettlement for the purpose of s. 74 of the Act of 1910 the overriding powers of revocation and new appointment had to be taken into account and that those powers had the effect of reducing the value of the property conveyed or transferred to a nominal sum and that the ad valorem duty under the said section should be assessed at 10*s.* The Commissioners admitted that the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived as aforesaid if sold at the date of the resettlement in the open market subject to the overriding powers of revocation and new appointment vested

in other persons by which they were liable to be defeated did not exceed a nominal sum which the Commissioners were prepared to agree at 50*l.*

15. The appellants contended alternatively that if they were wrong in their first contention and in their contention that the overriding powers of revocation and new appointment should not be disregarded but should be taken into account in valuing the property then the claim of the Commissioners to ad valorem duty should be restricted to the value in the open market of the reversionary interests of which Claud Berkeley Portman and his male issue were deprived by the resettlement over and above the new interests conferred on them by the resettlement, disregarding the overriding powers of revocation and new appointment. It had been agreed between the appellants and the Commissioners of Inland Revenue that the value (if such value was relevant to the issues in the Case) in the open market at the date of the resettlement of the reversionary interests of Claud Berkeley Portman and his male issue of which they were deprived by the resettlement, over and above the value in the open market at the date of the resettlement of the interests conferred on them by the resettlement, disregarding the overriding powers of revocation and new appointment, was the sum of 1,250,000*l.* The appellants accordingly contended that the Commissioners' claim to ad valorem duty should be restricted to 12,500*l.* ad valorem duty on 1,250,000*l.* The main reason for the difference between the said sums of 1,990,700*l.* and 1,250,000*l.* was that the asset which was under valuation was of a kind for which it would be extremely difficult to find a purchaser who would pay its full value.

16. The appellants, being dissatisfied with the assessment of duty at 19,907*l.* in pursuance of s. 13 of the Stamp Act, 1891, duly required the Commissioners to state and sign a Case setting forth the question on which their opinion was required and the assessment made by them, and the Commissioners thereupon signed and stated a Case accordingly.

17. The questions for the opinion of the Court were:—

(1.) Whether, in addition to the fixed duty of 10*s.* the resettlement was liable to 19,907*l*., as assessed by the Commissioners.

(2.) Whether, in addition to the fixed duty of 10*s*. the resettlement was liable to 12,500*l*. ad valorem duty on 1,250,000*l*.

(3.) Whether, in addition to the fixed duty of 10*s*., the resettlement was liable to 10*s*. ad valorem duty on 50*l*.

(4.) Whether, in addition to the fixed duty of 10*s*., the resettlement was liable to any duty, and, if so, what duty.

The appeal was heard before Rowlatt J. on March 18 and 19, 1929.

Latter K.C. and *F. McMullan* for the appellants.

Sir Thomas Inskip A.-G. and *J. H. Stamp* for the Crown.

ROWLATT J. In this case the stamp duty which has been claimed and which the Commissioners have allowed is a stamp duty at 1 per cent. under s. 74 of the Finance (1909–10) Act, 1910, which imposes a duty on "any conveyance or transfer operating as a voluntary disposition inter vivos" and requires it to be stamped "as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale." The object of the section was to make transfers by way of gift stampable, much in the same way as transfers by way of sale. In the present case the instrument that has given rise to the claim was an appointment made by a father and son, the tenant for life in possession and the next tenant for life under a power to revoke existing limitations and substitute new ones contained in a settlement of 1870. What in substance was done by the resettlement was to diminish the interest that stood limited to Mr. Claud Portman, the next brother, and give a greater interest to his next brother and his descendants, and so on. The figure at which the stamp duty has been assessed ad valorem is the value of the properties regarded as in possession diminished by the value of the life interest in possession and the next life interest, and also diminished by the value of the interests subsequent to those estates so far as they have been restored. In those circumstances it is clear, in my judgment, that this is a conveyance or transfer operating as a voluntary disposition within the section. It is true that the appointment does not merely re-enact a power of appointment, but it saves alive the power of revocation and new appointment under which it itself came into being, but in my judgment that does not affect it at all, because it is in itself an instrument within s. 62 of the Stamp Act, 1891, under which property is transferred and none the less so because it does not interfere with an arrangement whereby another instrument may be made which will make a new disposition of the property. In the meantime the effect of that deed is to vest the property. There seems no doubt about that; therefore it is quite clearly, in my judgment, within the section.

Then comes the question of the amount, and Mr. Latter raises two points. First of all he says: "Now this appointment, being subject to a number of existing and overriding powers of revocation and new appointment, gives an interest which is wholly of nominal value, because it can be divested at any time," and he says that that distinguishes this case from *Earl of Westmorland* v. *Inland Revenue Commissioners* (1) in the Court of Appeal, where the power of revocation and new appointment was created by a deed which itself fell to be stamped and was not reserved out of other deeds. Now I am bound to say that it does not seem as regards the valuation of things in this world that it matters much to a person who has property of which he is liable to be divested whether he is liable to be divested of it by a provision that is in the deed of 1870 or by a provision in the deed of 1911. I think one can look at it in a stricter way than that. What is to be valued is the property conveyed, and the property conveyed, as Mr. Latter says, and Mr. Stamp agrees, is the property less the interests existing in it—namely, the two life interests, to start with. Mr. Latter says it is also less the power of revocation, putting it as if the power of

(1) [1928] 1 K. B. 703.

revocation was something in the nature of an estate which intervened before the interest which was conveyed arose. Now that cannot be right. Of course, Mr. Stamp put it perfectly accurately in technical language when he said that a power is not property. I do not see the answer to that. A power is not property, and it is property that has to be valued. Now when one looks at what Sargant L.J. said (1) it was this: "The stamp duty chargeable is the stamp duty on the value of the property conveyed, and not merely on the value of the interests of those persons who gave no consideration at all for that conveyance." When he speaks of interest he does not say you have to pay every time upon the fee simple value in possession, but he is dealing with this very question, the question of an interest defeasible by the execution of a power of revocation. What he means is that you are not to look at the value as affected by the degree of security which the person has in the property. That is what he is dealing with, and it seems to me there can be no sort of difference as to whether the power of appointment is in this deed or in the previous deed. In either case what passes is the property subject to the life estates. It passes, and you have to value what passes now, and therefore I think Mr. Latter's point fails. It is true that the Master of the Rolls in that case did treat the power of appointment as being something which affected the value; but I am bound to say I think that was unnecessary to the decision, and Sargant and Lawrence L.JJ. do not seem to have adopted it at all. They simply value the property which passes as being something which does not include the power affecting the property at all.

That was the main point made by Mr. Latter; but he took another point. He contended that it was not the right way to get at the value of the property which passed to take the fee simple value in possession and then deduct life interests, because you could not get that sum for such property, but that you ought to start valuing by applying the discounts which the market would apply to property consisting of an obscure and complicated interest of this kind. I feel there is or might be a great deal in that contention, and it may be true that the question has never been argued, but I am not really in a position to give effect to that argument, having regard to what was said by Lord Cave L.C. in *Baker* v. *Inland Revenue Commissioners*. (1) Lord Cave there said: "Now we have had no argument as to whether the amount fixed by the Commissioners as the value of the property conveyed is correct or not, but we have been informed by the learned Solicitor-General that the amount was fixed by reference to the value of the estates in possession after deducting all incumbrances and deducting the value of the life estate of Sir Everard Cayley. So far I think that is right." That is a clear expression of opinion by the Lord Chancellor in giving judgment in a case in the House of Lords, and if right (and the point has never been argued) it is quite impossible for me to say that it is wrong. I think therefore that point also fails. In the result I must dismiss this appeal with costs.

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(1) [1928] 1 K. B. 714.

Appeal dismissed.

The appellants appealed. The appeal was heard on June 28, 1929.

Latter K.C. and *F. McMullan* for the appellants. The provisions of the deed of 1911 are all subject to the powers of revocation. The Commissioners have deducted nothing in respect of these powers. *Earl of Westmorland* v. *Inland Revenue Commissioners* (2) is distinguishable from the present case. There the whole estate was transferred subject to one life interest and the deed itself created a joint power of appointment. The only pre-existing power was then fully exercised and exhausted by the deed in question and the power which was under consideration was part of the disposition made by the deed. The judgment of the Master of the Rolls is based on this fact. Here all that was transferred were certain contingent reversionary interests which were subject to a pre-existing power of revocation, which was in no way affected by the resettlement.

(1) [1924] A. C. 270, 277.

(2) [1928] 1 K. B. 703.

The Commissioners have admitted (para. 14 of the Case) that if the power of revocation is taken into consideration the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived if sold in the open market would not exceed the nominal sum of 50*l.* The amount of the stamp ought therefore to be fixed at that sum.

There is an alternative point. The property is conveyed subject to preceding interests. The question is what it would fetch if sold in the open market. The Commissioners have, it is submitted, proceeded on a wrong basis. They have taken the value as that of property in possession of an absolutely free owner and have then deducted the value of the preceding life interests. The proper course was to value the property transferred at what it would fetch if sold in the open market. The method of valuing stated in the Case is wrong.

In *Baker* v. *Inland Revenue Commissioners* (1) no question as to valuation for the purposes of stamp duty of the property conveyed or transferred arose. The point was not argued.

Sir Thomas Inskip K.C. and *J. H. Stamp* for the Crown. The present case is really covered by the *Westmorland* case. (2) There is not much distinction between keeping alive a power of appointment and giving a new power. If the persons are the same the distinction is negligible.

The *Westmorland* case (2) is a clear decision that you are not to have regard to the power of appointment in considering the effect of s. 74 of the Act of 1910. The transfer takes effect when the property is conveyed, subject to the power. The release of the power does not affect the conveyance. The power of appointment is not property. You have first to ascertain what is the property conveyed and then to value it, and in so doing you cannot under the *Westmorland* case (2) take into consideration the effect of the power of revocation. The property conveyed is the interest and that is not affected by the power of revocation. By property is meant the interest conveyed. If the appellants' contention that the

(1) [1924] A. C. 270.

(2) [1928] 1 K. B. 703.

power of revocation ought to be taken into account in ascertaining the value of the property conveyed be correct it would follow that the property might be conveyed one day subject to the power of revocation and the next day the power released and the Stamp Act thereby defeated.

The plain words of s. 74 must be taken in order to see what is the property conveyed apart altogether from the question of the existence of any power of revocation. The argument for the Crown in this case is put by Sargant L.J. in the *Westmorland* case (1) in these terms: "Under sub-s. 5 you have to consider merely whether the document in question is brought by sub-s. 5 within the operation of sub-s. 1, and if it is so brought within the operation of sub-s. 1, then the stamp duty chargeable is the stamp duty on the value of the property conveyed, and not merely on the value of the interests of those persons who gave no consideration at all for that conveyance." The present case is more obscure, because the estates dealt with are estates in remainder. The new power of appointment in the resettlement of 1911 does not differ materially from the power contained in the previous deed.

It was contended that the Commissioners were wrong in taking the principal value of the land and then cutting it down, but it is submitted that in doing so they have adopted the only right course. They have acted upon the analogy of the valuation of property passing on the death under the Finance Act, 1894, s. 7, sub-s. 5. The Commissioners are the proper judges of the value of the property conveyed, and unless they have acted upon a wrong principle the Court ought not to interfere with their finding.

Latter K.C. replied.

LORD HANWORTH M.R. This case is, as all cases must be under the Finance (1909–10) Act, 1910, and in the complexity of the facts to which it has to be applied, difficult, but I have come to the conclusion after hearing the arguments on both sides, that the judgment of Rowlatt J. is right.

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(1) [1928] 1 K. B. 714.

The question that has to be determined is this: What is the right stamp duty which has to be paid upon a deed dated September 16, 1911? An observation obviously arises that that deed has been waiting for its stamp duty to be determined for a number of years. However, we are told that in the events which happened, and the difficulties which occurred, no complaint can be made of that lapse of time. In the interval which has elapsed since the date of the deed certain events have occurred in the Portman family. But we have to determine what is the stamp duty that is payable under s. 74 of the Finance (1909–10) Act, 1910. The facts that need be stated for the purpose of this judgment are few. It appears that the method adopted by the Portman family has been to pass the interests in their property by means of deeds in which there is a power of revocation, and there is a power in the deed in particular to which reference must be made. In a deed of 1870 there was a settlement of the estates, but with a power of revocation. We have had a short genealogical table put before us of the Portman family. Then in the events which have been stated in the Case the deed of 1911 was entered into. The effect of that deed was this: First of all, it was a deed which was for the purpose of making a resettlement of certain estates, and there was included in this deed, as in previous deeds, and in the deed of 1870, a power of revocation and new appointment by deed. But the estates were then settled (1.) to the use of William Henry Berkeley, the second Viscount Portman, for life, who died in 1919; (2.) to the use of Henry Berkeley Portman, the third Viscount, who died in 1923; and (3.) to the use of the first and other sons of Henry Berkeley Portman, that is to say, the sons of the third Viscount, and he had only a daughter. The Viscounty then passed on his death in 1923 to his brother Claud, who died on June 6, 1929. But so far as the settlement goes, items 1, 2 and 3 merely reproduce what had already been done before the deed of September 16, 1911. Then followed provisions which are set out in para. 4, items (4.) to (9.) of the Case. This deed of September 16, 1911, is one which I think clearly falls within s. 74 of the Act to which I have referred. There is what has been called, and was, I think, rightly called in *Earl of Westmorland* v. *Inland Revenue Commissioners* (1) a definition for the purposes of sub-s. 1 in sub-s. 5 of s. 74, and that is : " Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred." The Commissioners, exercising the powers which are given in that sub-section, have found in para. 11 of the Case that this deed of resettlement " conferred a substantial benefit on the persons (other than Claud Berkeley Portman and his male issue) who took interests thereunder in remainder expectant on the determination or failure of the uses," and so on. They have therefore found that it satisfies the definition in sub-s. 5, and so falls within sub-s. 1 of s. 74, the result being that it is a conveyance which operates as a voluntary disposition inter vivos and is " chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale." The question, therefore, that we have to determine is what ought the value of the property conveyed or transferred to be for the purposes of the stamp to be put upon this deed ? The resettlement deed contains, as I have already said, a power of revocation and new appointment. The Commissioners have held that in arriving at the value of the property conveyed or transferred the overriding powers of revocation and new appointment were to be disregarded, and such value was to be arrived at

(1) [1928] 1 K. B. 703, 708.

in one of two ways, both of which bring out the value of the property which has been conveyed or transferred at a total of 1,990,700*l.*

The first question that we have to determine here is: Were the Commissioners right in disregarding these overriding powers of revocation and new appointment? In my judgment the Commissioners, when they say that these powers "ought to be disregarded" mean to say "ought to be disregarded as an overriding consideration," because, if you will turn further on in the Case, you will find it stated in para. 14: "The Commissioners admit that the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived as aforesaid if sold at the date of the resettlement in the open market subject to the overriding powers of revocation and new appointment vested in other persons by which they were liable to be defeated did not exceed a nominal sum which the Commissioners are prepared to agree at 50*l.*" I think in using, therefore, the word "disregard" they meant to disregard what had been presented to them as overriding powers of revocation, and that they disregarded not in toto the fact that there was this power of revocation and resettlement, but they did not regard that power as an overriding factor, so as to force them to determine that the value would be 50*l.* and no more.

It appears to me that, so far as this Court is concerned, this point as to the overriding powers of revocation and new appointment is concluded by the decision in *Earl of Westmorland* v. *Inland Revenue Commissioners.* (1) In that case there were powers of revocation, and it is quite true that the powers which had there to be considered were the powers of revocation contained in the deed of resettlement, and not powers which stood outside it, as they do here in the deed of 1870, and, for my part, I am prepared to consider that these powers of revocation in the present case are to be treated as deriving their source from the deed of 1870. There is force in the point to which Mr. Stamp directed our attention, that inasmuch as they are reaffirmed, or, at any

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rate, not obstructed, in the resettlement of 1911, it may be said that they take a fresh spring from the deed of 1911, but it appears to me that the true view is to regard these powers as starting from and based upon the deed of 1870. It is also true that I pointed out in my judgment in the *Westmorland* case (1) that inasmuch as these powers of revocation were conferred by the deed in question, those powers ought to be taken into account as being one of the advantages conferred by the deed, because the persons to whom those powers were reserved had an opportunity again by revocation to resettle the property, an advantage which, to my mind, was not to be overlooked. But the broad question that we have to deal with is this: Does a power of revocation existing either in the deed or outside the deed nullify the effect of the settlement and render it a document which is governed by the powers of revocation, or is that to be taken as one of the features of the settlement, and estimated in its due place with the other provisions of it? It appears to me that the latter is the right view. I am quite conscious of the fact that the Court was dealing with a different settlement in the *Westmorland* case (1), but so far as the point is pressed upon us that this power of revocation was of such a nature that it really struck at the very root of the value of the resettlement, I think the Case negatives that argument. In my opinion Sargant L.J.'s words in that case to which I referred, even taken with due consideration of the facts which he had present to his mind, clearly indicate that it is not right to dwell on that feature of the settlement alone, and to attach an overriding importance to it. Referring to the argument that inasmuch as there preceded the estates of those persons a joint power of appointment in the late Earl and in the present Earl, the market value of the interest so given to the issue of the present Earl and the other persons taking under the settlement was absolutely negligible, and the stamp duty ought therefore to be not more than 10*s*., he says (2): "Now in my judgment that is not so. It seems to me that under sub-s. 5 you have to consider merely whether the document

(1) [1928] 1 K. B. 703.

(2) [1928] 1 K. B. 714.

in question is brought by sub-s. 5 within the operation of sub-s. 1, and if it is so brought within the operation of sub-s. 1 then the stamp duty chargeable is the stamp duty on the value of the property conveyed, and not merely on the value of the interests of those persons who gave no consideration at all for that conveyance. It seems to me that the language of the section and of the sub-section is quite clear, and there would no doubt be extreme difficulty on the other view in proceeding to assess the value upon the beneficial interests of the various persons who did not give value on the occasion of the settlement. I think that the conclusion of the learned judge, and the reasons which he gave for that conclusion, are alike accurate, but I should like to point out the result on the alternative that is suggested by the appellant that the stamp duty ought to be assessed, not on the whole value of the property conferred, but on the interests of those beneficiaries who did not give value." Then a little further on he adds: "In cases of this sort, where a settlement is made by father and son, and where a joint power is reserved to the father and son over the settled property, it seems to me that although technically the interests of the ultimate beneficiaries, subject to that joint power, are liable to be defeated by the exercise of the power, nevertheless they have in substance a very valuable though not quite indefeasible interest." As I have said, I hold that the Commissioners have not treated this as a governing factor, but they have taken it into consideration, and I think that it is right to take it into consideration, but they have come to the conclusion on the question of fact—which is for them—that there were elements which made this resettlement operative, and that it was not to be considered as nugatory by reason of the fact that it did contain the powers of revocation and new appointment. That is the answer to the first point.

It appears to me that in principle, if not in terms, the *Westmorland* case (1) has decided that you must estimate the value of the chance of the settlement being carried out as well as the possibility of its being nullified by the exercise of the power

(1) [1928] 1 K. B. 703.

of revocation, and I think that the Commissioners here have done that, and therefore that they have rightly come to the conclusion that this is an operative settlement which did in fact take effect as a conveyance or transfer within s. 74 of the Act to which I have referred. That being so, the question arises how are they to ascertain the value of the property conveyed or transferred ? That point gave me some difficulty, but it is to be observed, as was pointed out by Sir Thomas Inskip, that there are cases, and, in particular, a case antecedent to the Act of 1910, namely, the Finance Act of 1894, where when it has been determined that there shall be an ascertainment of the value of property sold in the open market, words were used to express that intention. The illustration is drawn from s. 7, sub-s. 5, of the Finance Act, 1894. In the present case the Commissioners are to ascertain the value of the property conveyed. It may well be that there is no market value which can be reached because there is no market which will give you the value. It may be that considerations apply to the particular property which would prevent the value in the market being a fair test, and it appears to me that a discretion is given to the Commissioners to ascertain the value of the property conveyed in the manner which they may think most appropriate, and that if they have not gone outside the limits of the discretion assigned to them we cannot interfere.

I think there is force in what they say in para. 15 that : "The main reason for the difference between the said sums of 1,990,700*l.* and 1,250,000*l.* is that the asset which is under valuation is of a kind for which it would be extremely difficult to find a purchaser who would pay its full value." That seems to throw light upon the considerations which have been taken into account by the Commissioners, and to show that they came to the conclusion that there was no market test to which this property could be subjected. By agreement you start with the value of the estates as a whole as being 7,454,200*l.*, and that mere statement shows that there is force and value in what the Commissioners have said as to the difficulty of finding a purchaser for such property.

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If you do not take the market value, what are you to do? There are other means of arriving at a value, and where there is no market for goods or for anything else, the Court must apply some rules which have found favour in other cases and which will afford a suitable and real value. In the *Westmorland* case (1) what had been done was to deduct from the value which had been determined certain life interests, and the like, so as to leave a balance which would give the measure of the value of the property that was left. That course seems also to have been followed in *Baker* v. *Inland Revenue Commissioners*. (2) Viscount Cave L.C., at the close of his judgment in that case, says (3): "Now we have had no argument as to whether the amount fixed by the Commissioners as the value of the property conveyed is correct or not, but we have been informed by the learned Solicitor-General that the amount was fixed by reference to the value of the estates in possession after deducting all incumbrances and deducting the value of the life estate of Sir Everard Cayley. So far I think that is right, but a doubt occurred to your Lordships whether there should not also have been deducted the value of the life estate in remainder which Mr. Francis Cayley reserved to himself by the terms of the resettlement. It is not necessary for your Lordships to determine that point, because the Solicitor-General has agreed that, without conceding the general principle (which may have to be argued in another case), he is willing in this case to make that deduction." Now it is quite true that that method of calculation was not fully argued out, but I cannot set aside as unimportant the approval which the Lord Chancellor expressed of reaching the value by reference to the value of the estate in possession after deducting the incumbrances and the value of the life estates not only of one but of two persons. It appears to me that that was the principle adopted in the *Westmorland* case (1), and that in that case we endeavoured to follow the principle to which approval had been given in the speech of Viscount Cave in *Baker* v. *Inland Revenue Commissioners*. (2)

(1) [1928] 1 K. B. 703.
(2) [1924] A. C. 270.
(3) [1924] A. C. 277.

Under these circumstances, it appears to me that the Commissioners were justified in selecting that method of reaching the value as being one which appealed to them and which had in certain cognate cases received the approval of the Courts. It would be impossible under those circumstances for us to say that in reaching that value they were not in their discretion to apply that measure, and that they were compelled to deal with it from the point of view of the market value of a particular interest when they had come to the conclusion that it would be an improper test to apply having regard to the magnitude of the property which was the very base of the valuation of the interests passing under the settlement.

For these reasons it appears to me that Mr. Latter's second point does not hold good, and that we are not able to reduce the stamp duty by the 7000*l.* consequent upon the suggestion that we should hold that the Commissioners ought to have found that the value was 1¼ million pounds and no more. It is important to remember that in these very difficult considerations of questions of fact and degree discretion as to what ought to be the stamp is left to the Commissioners acting within certain limits, and I should be sorry to disturb that discretion. It appears to me, for these reasons, that the Commissioners have exercised their discretion aright, that we cannot interfere with the conclusion, and for these reasons that Rowlatt J.'s judgment is correct and must be affirmed and the appeal dismissed with costs.

LAWRENCE L.J. In this case I have the misfortune to differ from my colleagues. The Commissioners had to determine the value of the property conveyed or transferred for the purpose of fixing the amount of the stamp duty payable in respect of the deed of appointment of September 16, 1911. The property conveyed or transferred by that deed consisted of certain freehold estates in London, Middlesex and Dorsetshire, subject and without prejudice to: (1.) certain family charges and powers of charging; (2.) the prior life estates of the second and third Viscounts Portman, and the estate in tail male in the first and other sons of the latter; and (3.) the power of revocation and new appointment contained in the settlement of 1870. The Commissioners have made an allowance in respect of the items (1.) and (2.), but have disregarded item (3.), and have valued the property conveyed or transferred by the deed of 1911, on the footing that it consisted of an indefeasible estate in remainder.

In my judgment they were not justified in ignoring the overriding power of appointment. The only property conveyed or transferred by the deed was a defeasible estate in remainder in the settled estates, and I can find no warrant for valuing that property as if it were an indefeasible estate in remainder; that to my mind is placing an artificial and not the real value on the property comprised in the deed. It was argued that the *Westmorland* case (1) was an authority for the procedure adopted by the Commissioners. In my judgment that case is essentially different from the present case, in that there the property comprised in the deed of appointment consisted of the whole of the fee simple in possession in the Sharlston Estates and operated to convey or transfer those estates, the power of appointment under which it was executed being wholly exhausted by that conveyance and transfer. The deed itself reserved a fresh power of appointment over the property thereby conveyed and subject to such power created fresh estates in the persons taking under it. The contention there was that, as the fresh power of appointment created no change in fact, because a similar power had existed under the previous settlement, the fresh power of appointment ought to be taken into account in valuing the property conveyed. The Court, however, decided that what the Commissioners had to look to was the property conveyed or transferred by the deed and not the interests of persons taking under it, and the Master of the Rolls expressly relied upon the fact that the power of appointment given by the deed was a fresh power of appointment and that the deed in conferring that power had conferred a benefit on the donees of the power. In my judgment the facts in

(1) [1928] 1 K. B. 703.

that case distinguish it from the present, in which the property was only conveyed subject and without prejudice to an outstanding overriding power of appointment. The value of such a property must, in my opinion, differ entirely from the value of property consisting of an indefeasible estate in possession not subject to any overriding power of revocation and new appointment.

In the result I have come to the conclusion that the Commissioners' duty was to fix the value of the parcels conveyed or transferred by the deed of 1911, and that in fixing the value of such parcels they ought to have taken into account the overriding power of appointment subject to which such parcels were conveyed or transferred. I agree, however, with what Sargant L.J. said in the *Westmorland* case (1), that the existence of such a power does not necessarily destroy the whole of the value of the estates taken subject to it in a case where it is contained in a family settlement. The Lord Justice there points out that it would be a mistake to think that the proper value of interests subject to such a power of appointment would be worth nothing. He considers that such interests would be substantial, although in the open market they might be unsaleable. Had it not been for the finding of the Commissioners in para. 14 of the Case that 50*l.* was the value of the property comprised in the deed of 1911 on the footing that the power of appointment had to be taken into account, I should have thought that the right course would have been to have sent the case back to them to ascertain the value of the property conveyed as a property subject to an existing overriding power of revocation and new appointment in the hands of members of the family. But as I read para. 14 the Commissioners are agreed that 50*l.* is the true value of the property subject to the existing power of appointment, and therefore, in my judgment, the amount of the stamp duty ought to be estimated on that sum only.

SLESSER L.J. I agree with the Master of the Rolls that this appeal should be dismissed. Once it is held that the

(1) [1928] 1 K. B. 703, 714.

question of the market value is not really the material point to be considered, a view which I believe to be correct, one is driven back to the meaning of the words "the value of the property" contained in s. 74, sub-s. 1, of the Finance (1909–10) Act, 1910, to which reference has been made. It is quite clear that, had the power of revocation been contained in the deed of 1911, this case would have fallen directly within the decision of the *Westmorland* case (1), and I do not wish to repeat what has been said by the Master of the Rolls beyond observing that while I fully appreciate the distinction which is made by Lawrence L.J. between the power of revocation contained in a deed earlier than the deed which itself transfers the property and one which transfers the property itself, as I read the *Westmorland* case (1), that can really make no difference in the result, unless indeed you are to have regard to the actual value of the property, in which case it may be that the revocation would have an effect on the value in the open market. But the observations of my Lord in the *Westmorland* case (1) and those of Sargant L.J. both bring me to the conclusion that, though they were dealing there with an estate of which only an interest within the estate was defeasible, to use the words of Sargant L.J. in that case, yet nevertheless the same principle would equally apply where the estate was defeasible as a whole, and for this reason, that the property which has here to be considered is the value of the property at the time at which it passes.

The power of revocation has not here been exercised, and never may be exercised. One has to look and see what is the value of the property apart from the contingency of revocation, as I think the Commissioners have rightly done, and, as they say in para. 12, "the overriding powers of revocation and new appointment were to be disregarded." I do not propose to read again the passages which my Lord read from the judgment of Sargant L.J. in the *Westmorland* case (2), which indicate the generality of his observations there, but when once it is concluded that the overriding powers of revocation ought to be disregarded,

(1) [1928] 1 K. B. 703.

(2) [1928] 1 K. B. 703, 714.

whether the whole estate is defeasible, or whether only interests in the estate are defeasible, as in the *Westmorland* case (1), then it is agreed between the parties when the question of the open market value is excluded that the figures contained in Table A which is annexed to the Case are the correct figures.

Slesser L.J.

I need only add this, that the Commissioners having found in para. 11 of the Case that the resettlement conferred a substantial benefit on the persons interested, that takes the case out of sub-s. 5 and brings it within the operation of sub-s. 1 of s. 74. The value of the property, therefore, has been found; the substantial interest has been found. It is not suggested that at the time when the value was assessed that the power of revocation had been or was about to be exercised.

I will only say in conclusion, if this further point needs to be added, that I am much impressed, in addition, with the observations made by Mr. Stamp, that it is difficult really to sever the powers of revocation given in the deed of 1870 from the deed of 1911, which preserves powers which might otherwise be destroyed. I have been by no means certain in my own mind that both deeds have not to be looked at to see what the actual situation was. As I see it here you have a series of settlements referred to in the deed of settlement itself as the book of settlements of the Portman family, and it is to make an artificial dissection in this case regarding the value of the property to say that it is particularly the deed of 1870, or particularly the deed of 1911. The whole scope and purpose of the transaction as a whole is to resettle the properties in the way that is indicated. All the properties which are unaffected by the settlement of 1911 have been excluded from the total in arriving at the value following the directions which were given in the House of Lords in that matter in *Baker* v. *Inland Revenue Commissioners*. (2) What is left is the actual subject-matter of this settlement; it is the property actually conveyed or transferred as a voluntary disposition, and in my opinion the value

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(2) [1924] A. C. 270.

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of the property at which the Commissioners have arrived is a right one, and the judgment of Rowlatt J. is consequently also correct and this appeal fails.

Appeal dismissed.

Solicitors for the appellants: *Wilde, Wigston & Sapte.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. I. C.

DAMPSKIP SELSKAB SVENDBORG *v.* LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY AND OTHERS.

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June 19, 20; *July* 2.

[1928. D. 1632.]

Shipping—Charterparty—Bill of Lading—Discharge of Ship—Obligation of Shipowner—Discharge into Wagons—" Within Reach of Shore Crane Tackle "—Handling Cargo in Slings—Releasing Slings in Wagons—Baltic Wood Charter, 1926, *clause* 15.

Shipowners issued bills of lading relating to the carriage of certain timber from a Baltic port to Garston Dock, Liverpool. The bills of lading incorporated clause 15 of the Chamber of Commerce Baltic Wood Charter, 1926, under which, in the events which happened, the shipowners' liability was to cease at the port of discharge when the cargo was discharged into wagons within reach of the shore crane tackle, and for any work done by the shipowners beyond delivering within reach of the shore crane tackle the consignees were to pay. Garston Dock is owned by a Railway Company who by their own servants do all the work of discharging vessels in the dock by means of their shore cranes, loading the cargo in wagons and conveying it to their depot where they sort it according to its marks and ultimately deliver it to its owners; and they apportion the cost of doing this work between shipowners and receivers. Purporting to act in accordance with this practice, the Railway Company charged the shipowners with the expenses of taking hold of the bundles of timber as these were slung over the wagons by the shore crane, of guiding the bundles into position in the wagons, and of unloosing the slings. The shipowners paid these charges under protest and claimed to recover the amount of them, contending that they were properly attributable to the receivers of the cargo:—

Held, by Scrutton and Russell L.JJ., upon the construction of the charterparty, that the shipowners were properly charged with the expenses aforesaid; Greer L.J. dissenting on the ground that, within the principle of *Petersen* v. *Freebody & Co.* [1895] 2 Q. B. 294, the shipowners had done their part in discharging the ship when they had placed the cargo within reach of those who were receiving it in the wagons.

Judgment of Branson J. affirmed.

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Dampskip Selskab Svendborg v. L. M. & S. Ry. Co.

Appeal from the judgment of Branson J. in an action tried before the learned judge without a jury.

The plaintiffs, the owners of the steamship *Laura Maersk*, by a charterparty dated January 9, 1928, chartered their ship to the Riga Timber Industry and Export Company and others, charterers, to proceed to Windau and there load a cargo of deals, battens, and boards and carry the same to Ellesmere Port and Garston Dock and there deliver the cargo upon being paid the freight named in clause 1 and charges if any named in clause 15 of the charterparty, which was in the form of the Chamber of Commerce Baltic Wood Charter, 1926.

Clause 15 was in the following terms :—

"The shipowner's liability shall cease at the port of discharge when the cargo is discharged at the ship's rail if discharged by hand or within reach of the ship's tackle or shore crane tackle if thereby discharged (the shipowner having the option of using ship's tackle or shore crane where permissible by local regulations). The cargo shall, however, be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and/or into lighters and/or craft and/or rafts and/or wagons and/or on to bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge. For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if discharged by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent. on the amount thereof and in addition the charge for Workmen's Compensation insurance. If the port of discharge is included in the schedule of apportionment last agreed between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom the charge for such work shall be as settled by the said schedule of apportionment plus 15 per cent. on the amount of such charges, and in addition the charge for Workmen's Compensation insurance, all of which are agreed at the amount stated in clause 16 hereof. In the execution of any work done beyond discharging cargo at the ship's rail or within reach of the ship's tackle or shore crane tackle, as the case may be, the shipowner shall act as a stevedore with the liabilities only of such and not further or otherwise, but the shipowner shall not be liable for damage by fire, even though caused by the act or neglect of the shipowner or his servants or of any person for whom he is responsible."

Clause 1 also contained the following stipulations: "If the consignees select one of the alternatives mentioned in clause 15, other than discharge on to the quay (which includes rough stacking thereon if and where customary and not usually done by the consignees), any additional expense (plus 15 per cent. thereon and in addition the charge for Workmen's Compensation insurance) of such delivery beyond the expense of delivery on to the quay as aforesaid shall be paid by the consignees to the shipowner in addition to the amounts above mentioned. If the port of discharge is included in the schedule of apportionment last agreed between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom, such additional expense shall be ascertained in accordance therewith." The port of Garston was not included in any such schedule of apportionment as above mentioned.

The London Midland and Scottish Railway Company, the first named defendants, were and are the owners of Garston Dock. Messrs. Denny, Mott and Dickson, Ld., the second defendants, were indorsees of three bills of lading in respect of 70,441 standards of batten ends, part of the aforesaid cargo of the *Laura Maersk*. The bills of lading incorporated the terms of the charterparty of January 9, 1928.

The London Midland and Scottish Railway Company themselves do all the work of receiving cargo from vessels in Garston Dock by means of their shore cranes, loading it in wagons and conveying it to their depot where they sort it according to its marks, warehouse it, and ultimately deliver it to its owners in accordance with delivery orders issued by the shipowners. The owners of the cargo take no part in the discharge. The Railway Company do not employ other firms to discharge vessels, but do the work of stevedores themselves by their own servants.

Between February 2 and February 4, 1928, there were delivered at Garston Dock 180,540 standards of deals, battens, and boards, including the 70,441 standards consigned to the defendants Denny, Mott and Dickson, Ld. All this cargo was delivered into the Railway Company's wagons by means of their shore crane. In accordance with their scale of charges the Railway Company charged the plaintiffs with payment of 11*s.* per standard for deals and battens and 11*s.* 10*d.* per standard for boards. These charges included payment for work done in taking hold of each bundle while in the sling attached to the shore crane tackle, lowering each bundle and guiding it into the wagon, and then releasing it from the sling. The plaintiffs objected to pay these charges, contending that the work of the shipowners in discharging cargo into wagons by means of shore crane tackle was accomplished when by means of the shore crane tackle they had brought the bundles within reach of men in the wagons, and that the lowering of the bundles and guiding them into convenient positions in the wagons and the releasing of them from the slings was properly the work of the receivers of the cargo and not that of the shipowners. The Railway Company however insisted on their charges and the plaintiffs, in order to get their ship discharged, paid the amount claimed, reserving the right to recover the amount paid for work done by the Railway Company after the cargo had been placed so that delivery could be taken by the receivers within reach of the shore crane. In the course of his judgment the learned judge said: "It is said that discharge within reach of the shore crane is completed as to each sling-load of timber as soon as the sling-load is brought within reach of the receiver and that the work of guiding the sling-load on to the quay or into the wagon is the receiver's work and not the ship's. I do not agree. Until the sling-load has been lowered on the quay or into the wagon and the sling unloosed and withdrawn by the crane from around the timber composing the sling-load the receiver cannot handle the goods. The sling cannot be cleared by hand. It was proved that the normal method of conducting the operation at Garston is that the sling-load of timber is deposited by the crane on to the floor of the wagon where the sling is cast off and withdrawn by the crane, and it is at that point that in my opinion the discharge or delivery within reach of the shore crane is complete. This view is supported by the decision of Lord Merrivale P. in *The Rensfjell.*" (1) The learned judge then found that the charge made by the Railway Company for this service was a reasonable charge, and the claim against the Railway Company failed.

With regard to the claim against the defendants Denny, Mott and Dickson, Ld., this was based upon a request by these defendants that the plaintiffs should pay to the Railway Company charges incurred by Denny, Mott and Dickson, Ld., for work done on their behalf by the Railway Company. The request was said to be implied from the supposed fact that the plaintiffs had been compelled to pay money properly payable by Denny, Mott and Dickson, Ld. But inasmuch as the learned judge held as above stated that the plaintiffs themselves, and not Denny, Mott and Dickson, Ld., were the persons liable to pay the charges, this claim also failed and judgment was given for both defendants.

The plaintiffs appealed from the judgment in favour of Denny, Mott and Dickson, Ld.

Le Quesne K.C. and *Chappell K.C.* for the appellants. The question in this appeal turns upon the construction of clause 15 of the charterparty of January 9, 1928, which was incorporated in the respondents' bills of lading, and particularly upon the construction of the opening words of that clause, which declare that the shipowner's liability shall cease at the port of discharge "when the cargo is discharged." The question is, when was the respondents' cargo discharged within the meaning of this charterparty? Clause 15 itself answers the question: the cargo is discharged at the ship's rail if discharged by hand. Discharge at the ship's rail is complete when the shipowner has put the goods so far over the ship's side as that the consignee can begin to act upon them; but the moment the goods are put within reach of the consignee he must take his part in the operation: *Petersen* v. *Freebody & Co.*, per Lord Esher M.R. (1) Clause 15 of the charterparty goes on to provide that discharge may be by means of ship's tackle or shore crane tackle, and that then it shall be within reach of the ship's tackle or the shore crane tackle, as the case may be. That is to say, when the goods are put by means of the ship's tackle, or of the shore crane tackle (as in the present case), within the reach of the consignee, he must take his part in the operation. Then there is a further provision, that the consignee shall be entitled to have the cargo discharged on to the quay or into lighters or wagons. That is to say, when the goods are by means of the shore crane put within reach of the consignee on the quay or in the lighter or in the wagon (as in the present case), he must take his part in the operation of discharge. In other words it was the receivers', and not the shipowners' business to take hold of the bundles in the slings when placed within their reach in the wagons, and to guide them into position, and then to release the slings. To discharge means to free a ship of its charge or cargo. It does not mean to stack on a quay or pack on a wagon. Yet that is the meaning attributed to the word by the learned judge. The part taken by the London Midland and Scottish Railway Company introduces an element of confusion into this case. If those parties are eliminated the position becomes clearer. In the ordinary and usual course the wagons would be the property of the receivers and it would be their right and their concern to load their wagons with their cargo; and convenience as well as authority points to the conclusion that the shipowners' obligation is performed when they have placed the cargo by means of the shore crane within reach of those

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(1) (1924) 16 Asp. 438, 444.

(1) [1895] 2 Q. B. 294, 297.

who are acting as the consignees' servants in wagons which must be taken to be the consignees' wagons.

Dunlop K.C. and *Stranger* for the respondents. The main object of this charterparty, the Baltic Wood Charter 1926, was to avoid disputes such as that which has arisen in this case. Similar questions often arose upon the terms of earlier charterparties, e.g., the Mer Blanc Charter and the Scandinavia-Finland Charter, 1899, which provided that cargo should be taken "from alongside." Questions arose upon the meaning of those words in certain exceptional cases: see *Palgrave, Brown & Son* v. *Owners of Steamship Turid* (1); *Smith, Hogg & Co.* v. *Louis Bamberger & Sons.* (2) The intention of the Baltic Wood Charter, 1926, was to define clearly the extent of the shipowner's obligation in discharging his vessel, both in his interest and in that of the cargo owner. Therefore, omitting the case where the discharge is by hand, cargo is to be discharged within reach of the ship's tackle or shore crane tackle. Formerly the discharge of a vessel was a joint operation in which both shipowner and cargo owner took part. In this process the ship was often delayed by the fault or misfortune of the cargo owner. Now the whole work of discharge is to be done by the shipowner, who having control is not affected by circumstances peculiar to the owners of the cargo. The cargo may have to be discharged on the quay, or into lighters or, as in this case, into wagons; but then the whole work of discharge into the wagons is to be done by the shipowner; subject in all cases to the limitation that he is not chargeable for any work done beyond the reach of the ship's tackle or of the shore crane tackle, but that the cost for such work, if in fact done by the shipowner, plus 15 per cent. of that cost, is to be paid by the cargo owners. The whole work of discharge into wagons includes taking hold of the bundles in the sling, guiding them into position in the wagons, and releasing the sling. Until these acts have been performed the bundles are not delivered into the wagons. Moreover the charterparty provides that if the port of discharge in question is included in an agreement

(1) [1922] 1 A. C. 397.

(2) [1929] 1 K. B. 150.

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between the Chamber of Shipping and the Timber Trade Federation, the payment for work done in discharging the vessel is to be settled by the agreement. In fact many ports of discharge are included in such agreements, though Garston is not one of these; and in many cases where ports are included in an agreement the shipowners are charged with payment for the whole work of discharge down to and including the release of the sling.

Le Quesne K.C. in reply.

Cur. adv. vult.

July 2. The following written judgments were delivered :—

SCRUTTON L.J. This appeal is another chapter in the prolonged struggle between the Timber Trade Federation and the Chamber of Shipping of the United Kingdom as to the incidence of the expense of discharging timber at the various ports of the United Kingdom. The two contending parties had originally arranged the Scanfin charter of 1899 in which the relevant clause ran " Cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." Under this clause work was being done under customary arrangements at a number of British ports. These arrangements were upset by the decision of the House of Lords in *Palgrave, Brown & Son* v. *Owners of Steamship Turid* (1), a case relating to the peculiar circumstances of the port of Yarmouth, that no place could be " alongside " by custom which was not " alongside " in the ordinary sense of the word. In 1924, the contending parties arranged a new version of the Scanfin charter, 1924, which left out the debatable word " alongside " in relation to discharging, and inserted a new clause 13. " The cargo shall be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and/or into lighters and/or craft and/or wagons and/or on to bogies and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of

(1) [1922] 1 A. C. 397.

these alternatives if customary and available at the time of discharge. But any work done by the vessel at the port of discharge beyond delivering the cargo within reach of the ship's tackle or of the shore crane tackle (the shipowner having the option of using ship's tackle or shore crane where permissible by local regulations) shall be at consignees' risk and expense. The cost of such additional work shall be determined in accordance with a Schedule of apportionment to be agreed from time to time between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom at ports where the Schedule applies." At this stage it was apparently contemplated that the Federation and the Chamber would be able to agree for each port the amount to be paid by the consignee for work done by the ship after delivery as defined in the clause when the ship was working "in the customary manner."

As appears from the agreed Schedule of apportionment the two bodies, the Chamber and the Federation, were able to agree, for a large number of ports, the amount of the consignees' payment. But for some reason not stated to us, it was again thought necessary to alter the form of charter, and a new arranged form, the one in question in the present case, known as the Baltwood Charter, 1926, was produced. The port of discharge in the present case was the well known Garston Dock near Liverpool, owned by the London Midland and Scottish Railway Company. The Chamber and the Federation had not been able to agree, or at any rate had not agreed, an apportionment of the charges at this port.

At Garston the only possible method of discharge is by shore cranes worked by the Railway Company, on to wagons within reach of the shore cranes. Where there are several consignees the cargo is sorted by the Railway Company for delivery to them by marks and numbers at a yard to which the wagons are moved and delivery orders are issued to the consignees after this sorting. Clause 15 of the Baltwood Charter makes certain additions to clause 13 of the Scanfin Charter, 1924. First, it adds two sentences about shipowners' liability: (*a*) the first sentence as to liability for the work up to delivery or discharge provides that the liability is to cease when the cargo is discharged within reach of the shore crane tackle; (*b*) the last sentence as to liability for the work done by the ship for which the consignee is to pay, i.e., work done after discharging within reach of the shore crane tackle, provides that the shipowner is to have the liability of a stevedore, subject to a special provision as to fire. Secondly, as the Chamber and the Federation have now agreed an apportionment in many ports, it adds a sentence that the cost shall be apportioned under that apportionment which it contemplates shall be fitted into the Schedule in clause 16. Clause 16 contains a note in small print: "If the port of discharge is not included in the Schedule of apportionment, the charges (if any) under clause 15 shall be paid in addition to the freight above mentioned," providing what is to happen if the Schedule of apportionment does not contain the port of discharge named in the charter, which is the present case, and says the consignee is to pay the charges, if any, under clause 15, that is, the cost of any work done by the vessel beyond delivering cargo within reach of the shore crane tackle. Clause 16 at the beginning speaks of the apportionment of charges under clause 1; the last sentence of clause 1 provides that any additional expense of the mode of delivery selected by the consignee over the cost of delivery on to the quay shall be paid by the consignee. This hardly seems to be the same as the provision of clause 15 that the consignee is to pay the cost of work done by the ship after delivery within reach of the shore cranes. But neither side before us attempted any explanation of the meaning of clause 1 on this point, or based any argument on it, and I deal with the matter in the words of the footnote to clause 16, as to be determined by the words of clause 15.

The dispute between the two parties was this. Counsel for the ship said: I have delivered, and my liability ceases, when the timber swung on the shore cranes is within reach of the consignee in the wagon, though it is still in the air and tied up in the sling; the consignee must pay the cost of manœuvring it into and on to the floor of the wagon and, counsel added under pressure, the cost of releasing the sling. Pressed as to the cost of the craneman who lowered the sling from "within reach" to the floor of the wagon, I think counsel admitted that this was ship's work in delivering and that the consignee could not be called upon to pay for it. Counsel for the consignee said that he was entitled to have the timber discharged into wagons, and that this work was not done until the timber was in the wagon, not merely hanging near it, and until the timber was released from the sling which tied the pieces together and attached them to the crane. I mention, to show that I have not overlooked it, that it is not ordinarily good delivery to tender goods of two consignees claiming different marks mixed up together and to leave the consignees to sort them, but the consignees seem to have acquiesced, as they do in London, in the form of delivery.

In my view the fallacy of the argument for the ship lies in this, that it turns the phrase "delivery within reach of shore crane tackle" into "delivery within reach of consignee," and argues that though the ship is bound to deliver into wagons, it does so if it brings the sling of timber hanging on a crane within reach of the consignee standing in a wagon, and leaves the consignee to manœuvre the timber into the wagon and release it from the sling. These latter operations are, in my opinion, part of the work of delivery or discharge into wagons, which the ship has undertaken to do, and the words "within reach of shore crane tackle" are inserted to limit the area within which the ship can be required to deliver into wagons. This is not a case of delivery at ship's rail where the consignee takes from the rail the cargo which the ship brings to the rail, both parties possibly having hold of the package at the same time. The ship has undertaken to deliver beyond the ship's rail, that is into wagons, provided the wagons are within the reach of the shore crane tackle. Stowage or stacking in the wagons or on the quay, where customarily done by the ship, is for expense of the consignee. I cannot think the ship has delivered the cargo into wagons when it is still in the air, or has made delivery of goods which are still fastened or tied to the tackle of the crane the ship is using.

I have come to this conclusion on the wording of the charter, but it is confirmed by the apportionment which the Chamber and the Federation have agreed to at ports where discharging into wagons by crane is customary. For instance, at the Ship Canal port of Manchester discharge into wagons by crane, whether ship's crane or shore crane, is customary, and it is agreed that the ship pays " for discharge direct from ship to wagon alongside and releasing from ship's tackle or shore crane." At the Hartlepools, where the customary method is discharge into wagons, the ship pays for discharge into wagons by shore crane and releasing slings only. Any work done beyond release of the sling is payable by consignees. At a number of ports where delivery by shore crane into wagons is customary, the ship pays the expense of delivery and the consignee nothing. Examples of such ports are Cardiff, Glasgow, Swansea, Milford Haven, and Irvine. The Belfast apportionment for ship's tackle mentions that the ship must release the sling.

The judge below expressed his view as to the point where delivery or discharge, which I think mean the same thing, terminated in the following words: " I think it plain that the discharge or delivery within reach of shore crane intended by this clause is a delivery or discharge overside on to the quay or into craft or wagons as the custom of the port demands, the words 'within reach of shore crane' limiting the distance from the ship's side beyond which the shipowner need not, in his capacity of shipowner, transport the goods and within which he is called upon to deposit them." I agree with this view; and I think it is fatal to the claim of the ship against the consignee under the charter.

There appears to be nothing in the authorities to negative this construction of the charter. Reliance was placed upon *Petersen* v. *Freebody & Co.* (1) This decision related to a cargo of spars and poles in the Surrey Commercial Docks under a charter which provided that cargo was to be taken from alongside the ship at merchant's risk and expense. The discharge of the poles was into lighters alongside through the ship's bow ports under a clause entitling the consignee to "discharge over side into lighters or otherwise." The custom of the Port of London as to discharge into lighters, which was afterwards proved in *Glasgow Navigation Co.* v. *Howard* (1), was not proved in *Petersen* v. *Freebody & Co.* (2) The claim was for demurrage occasioned by the consignees having insufficient men in the lighters. The express provision was that the ship was to deliver overside into lighters, and no crane was used; a ship's man on a stage hanging outside the ship took hold of the end of the pole as it came out of the bow port, and pulled it till the men in the lighter got hold of it and completed the operation. The Court treated the matter as analogous to delivery at the ship's rail, the ship placing the pole where the consignee could reach it and the consignee then assisting in handling it. There was no question of the poles being in a sling which had to be released, or being lowered by ship's tackle into the lighters. In my opinion, the judgment of the Court on these special facts has no bearing on the different facts in this case and on the language of the present charter. Here the ship agrees to deliver into wagons and does so by lowering the timber attached by rope to a crane. In my view the ship has not delivered till it has lowered it into wagons and released the attachment to the crane. Till this is done, the timber is not in the wagon and is still attached to the shipowner's tackle.

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(1) [1895] 2 Q. B. 294.

In my view Branson J. came to a correct conclusion, and the appeal must be dismissed with costs.

GREER L.J. This is an appeal against the judgment of Branson J. dismissing a claim made by the appellants against the receivers of a portion of the cargo of the steamship *Laura Maersk* at the port of Garston, for a part of the expenses incurred in connection with the discharge of the cargo which the shipowner paid, and which he says, under the terms of the bill of lading which incorporated the terms of the Baltic Wood Charter, 1926, he was entitled to recover from the defendants.

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(1) (1910) 15 Com. Cas. 88.

(2) [1895] 2 Q. B. 294.

The cargo shipped under the charterparty was described as deals, and/or battens, and/or boards, and/or scantlings. The bills of lading related to a quantity of batten ends.

The usual practice at the port of Garston is for the work of discharge and receipt of the cargo to be done by the servants of the London Midland and Scottish Railway Company, who are the dock authority. It is a convenient practice which enables the whole of the work to be done continuously by one body of men, and the charges afterwards to be allocated to the ship and to the receiver of the cargo. The Railway Company have their own schedule as to the charges which they make against and collect from the ship, and the charges which they make against and collect from the receivers, but of course their allocation cannot determine the rights of the parties inter se. These fall to be determined by the bill of lading agreement to which the receiver becomes a party by taking an assignment of the bill of lading.

The material provisions of the charterparty are contained in clauses 1 and 15. [The Lord Justice read clauses 1 and 15 and proceeded :] The Railway Company collected from the ship 11*s.* per standard for deals and battens, and 11*s.* 10*d.* per standard for boards. It was proved, and found by the judge, that this charge included a proportion, which he found to be three-eighths, of the remuneration paid to the men who stood in the wagons to receive the timber in the slings, for the work of manœuvring the timber into such a position as would enable them to place it conveniently in the wagon concerned. The plaintiffs say that this proportion of the charge which they had to pay is in respect of work which was done on behalf of the receiver, work for which they are entitled to be repaid under clause 15 of the charterparty.

In order to interpret correctly clause 15 of the charterparty, it seems to me necessary to consider, in the absence of express

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agreement, what part of the work of discharge and receipt of the cargo is the obligation of the ship, and what part is the obligation of the receiver. In my judgment it has been accepted for many years that the law on this subject is accurately stated in the judgment of Lord Esher M.R. in *Petersen* v. *Freebody & Co.* (1) It is true that that was a claim for demurrage, but the Court had to consider who was responsible for the delay to the ship, and for that purpose to decide when the obligation of the ship to deliver had been complied with, and when the obligation of the bill of lading holder to receive the cargo had commenced. In giving judgment Lord Esher uses these words: "The operation, therefore, which is to take eight days is an operation to be performed as between the shipowner and the consignees. Whichever word be used, whether it be called a 'discharging' or a 'delivery,' and whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery—where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay. Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery: that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them.

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(1) [1895] 2 Q. B. 294, 297.

He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the one in giving and the other in taking delivery; at another moment the joint act is finished. Where goods are slung, and lowered gradually over the side of the ship into a lighter, they cannot all be deposited on the same spot in the same lighter. It is obvious, therefore, that those on board must help in the operation of taking delivery by guiding the thing as it is coming down into the lighter. In the present case the delivery was of spars; but it was still a joint operation in which each party had to take his part. The shipowner had to get the spars in such a position as that they could be taken out of the ship. He had not completed his part of the operation by merely getting the spar on to the stage; but, when one end of the spar was tipped over the side of the stage so as to come within the reach of the men in the lighter, they had to take their part in the ordinary operation in the ordinary way: they had to assist in getting the spars into the lighter." There is nothing in the other judgments which show any disagreement with the view expressed by Lord Esher in the words I have quoted. That this has been generally accepted as defining the respective duties of the ship and the receiver of the cargo appears from the judgment of Lord Birkenhead L.C. in the case of *Palgrave, Brown & Son* v. *Owners of Steamship Turid* (1), where he says: "The words of the charterparty in this case are: 'Taken from alongside the steamer at charterers' risk and expense.' I am myself of opinion that the word 'alongside,' if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation." In *Smith, Hogg & Co.* v. *Louis Bamberger & Sons* (2) Wright J. says, after referring to a

(1) [1922] 1 A. C. 397, 404.

(2) [1929] 1 K. B. 150, 163.

number of authorities: "I deduce from these authorities the conclusion that the cargo is 'alongside' when it is available for release or is released from the ship's slings if discharged by the ship's tackle and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship." I think the learned judge is there accepting the law as laid down in *Petersen* v. *Freebody & Co.* (1) I give the same effect to the words he uses further on (2): "Apart from custom, the placing into lighters would be a joint operation, requiring the receivers to have their men in the lighter to take the goods as soon as they are within their reach: see the cases of *Petersen* v. *Freebody & Co.* (1) and *Brenda Steamship Co., Ld.* v. *Green.*" (3) In the same case when in the Court of Appeal (4) I used these words, referring to a former judgment in *Rederi Aktiebolaget Aeolus* v. *W. N. Hillas & Co., Ld.; The Oresund* (5), which was tried before me and went to the House of Lords (6): "To put the goods over the rail is thus the prima facie limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charterparty about the consignee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivery into bogies 18½ ft. from the ship's side. It has been decided that the ship's obligations, even where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom of the port . . . . so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking the goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charterparty, and is not binding on the parties to the contract." I see no reason to alter my view as to the law

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(1) [1895] 2 Q. B. 294.
(2) [1929] 1 K. B. 165.
(3) [1900] 1 Q. B. 518.
(4) [1929] 1 K. B. 178.
(5) (1925) 30 Com. Cas. 271, 278.
(6) [1926] W. N. 315; 96 L. J. (K. B.) 186; 32 Com. Cas. 69.

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applicable to cases like the present. When the goods in the sling are within the reach of the receiver's men they must begin to act and do what is necessary to guide the goods into position on the quay or in the lighter, though, of course, the ship's men must lower the parcel with the ship's derrick or the shore crane. This, I take it, is the limit of the ship's duty in discharging cargo subject to any extension that may be made by express contract or by custom. There had been many cases in which the question of the meaning of "alongside" had to be considered for the purpose of determining that local customs were consistent with the provision that the cargo owner should take the goods from alongside, or that the cargo should be taken from alongside at his cost and expense, and it was in this state of the law that the Baltic Wood Charter, 1926, was settled as the form of charter to be adopted by steamship owners and shippers of wood goods from the Baltic. In my judgment the effect of clause 15 is as follows. It starts in the first line from what I conceive to have been the accepted rule of law as stated by Lord Esher in *Petersen* v. *Freebody & Co.* (1), that the shipowner's liability in relation to the discharge or delivery of the cargo if delivered by hand terminates at the ship's rail, and if delivered by ship's tackle, or by the shore crane, terminates when the goods in the tackle are within the reach of the receiver's men in lighter or on quay subject to the ship doing the necessary lowering of the parcel. This does not, I think, mean as soon as the receiver's men can touch the goods, but as soon as the goods reach a position in which the receiver's men can effectively deal with them for the purposes of accepting delivery and putting them either on the quay, in a lighter, or in a wagon. It is an express provision that at that point the ship's obligations with reference to discharge or delivery are to cease, except as aforesaid; but the clause goes on to provide in the second sentence that for the convenient discharge of the cargo, the ship is to do something which is in addition to that which they do under their liability. I read the second sentence as meaning, "notwithstanding what is hereinbefore

(1) [1895] 2 Q. B. 294.

provided with regard to the extent of the ship's liability, the ship must continue operations until the goods are on the quay or into lighters, or craft, or rafts, or wagons, or bogies, and thereon stowed or stacked, as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge." Then I read the next sentence as meaning that inasmuch as the shipowners are thereby exceeding that which is their liability as defined in the first sentence, the consignees are to pay to the shipowners the cost of that which is done in excess of that liability and 15 per cent. in addition, and I do not think the obligations put upon the consignee by clause 15 can be deemed to be limited because a less onerous obligation is put upon him by clause 1.

In my opinion the decisive question in this case is what is the correct interpretation of the first sentence in clause 15. The words used are intended to define the extent of the ship's liability in the operation of discharging the cargo. It is clear that the first limb of the sentence provides that where the discharge is by hand, the liability of the ship ceases when the cargo is put on the ship's rail within reach of the consignee's men. So far the clause adopts the ordinary obligation of the ship as laid down in *Petersen* v. *Freebody & Co.* (1); it then goes on to provide that where the discharge is by the ship's tackle, the ship's liability shall cease when the cargo is discharged within reach of the ship's tackle. I cannot think that this means that as soon as the cargo is within reach of the ship's tackle the ship's liability ceases. This would mean that it ceased as soon as the cargo was within reach of the ship's tackle in the hold. I think the clause is contemplating a discharge by ship's tackle to a receiver on the quay, or in the lighter, and that it means that the ship's liability shall cease when the cargo is by the tackle placed within the reach of the receiver's men in the lighter or on the quay; and that a similar effect must be given to the words relating to discharge by the shore crane. I think the clause was intended to give effect by express agreement

(1) [1895] 2 Q. B. 294.

to the obligation of the ship as laid down in *Petersen* v. *Freebody & Co.* (1), and does not have the effect of extending the ship's obligations beyond the point to which they would extend in the absence of the clause. The object of clause 15 was, in my judgment, to provide for the doing by one set of hands of the work of the ship and the receiver, and to provide that when the shipowners have done what is beyond their usual liability, the work, though done by the ship, shall be paid for by the receiver.

For these reasons I think this appeal should be allowed, but as my brethren think differently, the appeal will be dismissed.

RUSSELL L.J. The determination of this appeal depends upon what is the true meaning of the third sentence in clause 15 of the Baltwood Charterparty, which provides for the payment by the consignees to the shipowner of the cost (plus 15 per cent. on the amount thereof) of certain work done by the vessel at the port of discharge.

In the present case the defendants, Denny, Mott and Dickson, Ld. (whom I will refer to as the defendants), were the indorsees of bills of lading for batten ends which were discharged into railway wagons by means of shore cranes at the port of Garston.

Under the charterparty the whole process of discharge down to and including stowing and stacking is to be conducted by the ship. Clause 15 is the clause which relates to discharging. It consists of five sentences. The first sentence provides for the cesser of the ship's liability when the cargo is discharged, and in so doing it refers to the three means of discharging cargo which the charterparty contemplates—namely, by hand, by ship's tackle, and by shore crane tackle. The second sentence places on the ship the obligation to discharge and to stow or stack; it also enumerates various places and apparatus on or into which the cargo shall be discharged, including the quay, lighters and wagons. The third sentence runs thus: "For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if discharged by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent. on the amount thereof and in addition the charge for Workmen's Compensation insurance." The fourth sentence has no application to the present case, and neither it nor the fifth sentence appears to me to afford assistance on the point of construction.

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(1) [1895] 2 Q. B. 294.

The ship claims that once the shore crane has swung a load of timber in slings from the ship to a point in mid-air within reach of the hands of the men in a railway wagon, so that they can manœuvre the load into a position suitable for lowering into the wagon, that load is cargo delivered within reach of the shore crane tackle, and that the expense of any work done from that moment by the vessel in discharging is (with the percentage) payable by the defendants.

The defendants concede that they are liable to pay in respect of all work done by the ship after the load has been discharged into the wagon, that is, after the sling has been released. It is in respect of the work done in between these two points of time that the dispute arises.

As a result of close discussion the point resolved itself into this: Do the words in the third sentence "within reach of the ship's tackle" operate to describe a particular kind of delivery to the consignee, from and after the occurrence of which all expenses (plus a percentage) are to fall on the consignee, or do they merely describe the area within which the ship has to fulfil her obligation to discharge the cargo? In other words does the third sentence mean, that all work done by the ship in discharging her obligations under the second sentence, beyond putting the cargo within the consignee's reach by means of the shore crane tackle, must be paid for by the consignee; or does it only mean, that all such work beyond delivering into wagons within the area of the shore crane's reach must be paid for by the consignee? In my opinion the latter is the true meaning and the natural meaning of the words used. The ship's argument gives an artificial meaning to the language of the third sentence. The "reach" referred to is not the reach of any individual, but is the sweep of the crane. It would involve redrafting the sentence to read it as though it referred to the cargo being brought by the shore crane to a point within reach of somebody for the purpose of handling. The more natural reading of the third sentence is that the delivery of the cargo there referred to is the same delivery which is referred to in the second sentence as "discharge into wagons," and that the words "within reach of the shore crane tackle" refer to the area within which delivery is to take place, and do not operate to describe and create some form of constructive delivery which falls short of the delivery contracted to be given by the second sentence.

Numerous authorities were cited in the course of the argument, but I confess that I failed to appreciate the relevance of them to the point of construction which we have to decide. They dealt with the meaning and effect of words imposing obligations to take cargo "from alongside," and the effect thereon of port customs. The only one on which it occurs to me to offer any remarks is *Petersen* v. *Freebody & Co.* (1) In that case the ship sued the consignees for demurrage. The charterparty provided that the cargo (spars and poles) was to be taken from alongside the ship at the merchants' expense. It also contained a provision: "The ship to discharge overside in the river or dock into lighters or otherwise if required by consignees." That provision, it was held, imposed no obligation on the ship to complete the whole operation of getting the spars out of the ship and putting them into lighters: it only gave the consignees an option to take delivery by lighters or in some other way. Accordingly delivery under that charterparty was to be a delivery in the ordinary way by a joint operation in which the ship and the consignees were to take their respective parts. The consignees were held liable for demurrage, because the delay in the unloading had been caused owing to the insufficient number of men provided by the consignees to discharge their

(1) [1895] 2 Q. B. 294.

part of the joint operation—namely, taking delivery by guiding the spars, as they were coming down into the lighter. The case was relied upon as showing that in the present case there was delivery by the ship at the point of time when men in the wagons were able to guide the sling loads, as they were coming down, into the wagons. The following passages in the judgments were cited in support of this view. Lord Esher says (1): "Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery: that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship; but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them; but the moment the goods are put within the reach of the consignee he must take his part in the operation." Kay L.J. says (2): "I think that his (the shipowner's) duty is completed when he has discharged over side and put the spar under the dominion and control of the men in the lighter." A. L. Smith L.J. says (3): "As has been pointed out by the Master of the Rolls, the giving and taking delivery is a joint operation. It is contended here, that because the cargo was a cargo of spars the consignees had not to receive the spars until the ship's crew had put them into the bottom of the lighter. If that be so, the case forms an exception to the general rule. But what is there to show that there is any duty on the shipowner to do that which he is not bound to do with respect to any other cargo, namely, to put his crew off the ship and on to the lighter?"

The language used by the learned judges, while most appropriate to the facts of that case, appears to me quite

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(1) [1895] 2 Q. B. 297.
(2) [1895] 2 Q. B. 299.
(3) [1895] 2 Q. B. 300.

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inapplicable to the present charterparty, by which in express terms the obligation is put upon the ship to carry out and complete the whole operation of getting the cargo out of the ship, delivering it into wagons and stowing it there. *Petersen* v. *Freebody & Co.* (1) does not, in my opinion, assist to the conclusion that the word "delivering" in the third sentence of clause 15 of the Baltwood Charterparty connotes any delivery earlier in point of time than that which is stipulated for by the second sentence—namely, discharge into the wagons.

I find myself in agreement with the judgment below and with the views of Scrutton L.J., and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Trinder, Kekewich & Co.*

W. H. G.

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(1) [1895] 2 Q. B. 294.

PERRIN *v.* DICKSON (INSPECTOR OF TAXES).

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June 18, 19;
July 23.

Revenue—Income Tax—Annuity—Insurance—Educational Policy—Capital Repayments—Annual Instalments—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D.*

By a policy of assurance effected by a parent with an Assurance Society to provide for his son's education, the Society, in consideration of six premiums of 90*l.* each, paid annually between 1912 and 1917, agreed to pay to the son's guardian an annuity of 100*l.* each year for seven years as from September 29, 1920. If the son should die before the expiry of the seven years the premiums were to be repaid to the parent or his representatives less any annual payments already made, but without interest. The parent also effected a similar policy to provide for his daughter's education by which the Society agreed to pay him 50*l.* a year during a period of five years. There was evidence that the sums payable were calculated so as to return, in the event of the son and daughter living the full period, the amounts paid to the Society with compound interest. The parent duly received the annual payments, and assessments were made upon him for income tax under Sch. D, Case III., of the Income Tax Act, 1918, on these sums as on an annuity for these years:—

Held, that the annual payments made in each case by the Society did not constitute an annuity under the Income Tax Acts, but were intended to effect a repayment of the principal sum with interest, and therefore that income tax was only payable upon such part of them as consisted of interest.

Decision of Rowlatt J. [1929] 2 K. B. 85 affirmed.

APPEAL from a decision of Rowlatt J. (reported [1929] 2 K. B. 85) on a Case stated under the Income Tax Act, 1918, s. 147, by Commissioners for Special Purposes of Income Tax Acts.

The material facts, taken from the Case stated, were as follows: At a meeting of the Commissioners on April 16, 1928, the Right Rev. W. W. Perrin, the Bishop of Willesden, appealed against assessments under Sch. D to income tax in the sum of 150*l.* for each of the years ending April 5, 1922 to 1926 inclusive.

By a policy of assurance dated September 18, 1912, between the Bishop and the Clergy Mutual Assurance Society, after reciting that the Bishop desired to effect an assurance with the Society for an annuity for and on behalf of his son, Michael Perrin, it was agreed that in consideration of

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premiums of 90*l.* 15*s.* 10*d.*, payable yearly on September 18, from 1912 to 1917 inclusive, the Society would pay to the guardian of Michael Perrin an annuity of 100*l.* for seven years. The first payment was to be made on September 19, 1920, and on every subsequent September 19 up to and including September 19, 1926, if Michael Perrin should live so long. It was further provided by the policy that in the event of the death of Michael Perrin the total amount of the premiums paid in respect of the assurance, under deduction of any amount that might have been received by way of annuity, but without interest, should be paid to the Bishop or his representatives or assigns. A policy in similar terms, dated September 12, 1912, was entered into by the Bishop with the Society for an annuity for his daughter, Margaret Perrin, the premium being 33*l.* 7*s.* 6*d.* for six years, 1912–1917, and the annuity 50*l.* for five years from 1920 to 1924.

Evidence was given before the Commissioners that the sums payable were calculated so as to return to the Bishop, in the event of the nominee living, the amount which the Bishop had paid to the Society, with compound interest at 3 per cent.

The Bishop, as guardian of Michael Perrin and Margaret Perrin, duly received the sums payable under the two policies, and the assessments under appeal were made on him in respect of the sums which he so received.

The Bishop contended that the sums paid to him under and by virtue of the policies were not annuities or other annual sums taxable under the Income Tax Acts; that they were capital and represented repayments to him of sums deposited by him with the Society, which, in the events which happened, became repayable by the Society with interest by instalments on certain specified dates; that the sums were not and did not become annuities, because they were so described in the policies; that in substance and in fact the policies provided for payment to him of two capital sums of 700*l.* and 250*l.* respectively or, in certain events, of lesser sums by equal yearly instalments; and that the assessments should be discharged. Alternatively that only such part of the sums assessed as might be found to represent interest on the premiums paid by the appellant was liable to income tax; and that the assessments should be reduced.

For the Crown it was contended that the sums paid to the Bishop under and by virtue of the policies were annuities and were assessable in his hands under Sch. D; and that the assessments were correct and should be confirmed.

The Special Commissioners held that the payments by the Society to the Bishop were annuities, and as such were liable to income tax, and they confirmed the assessments.

Rowlatt J., on appeal, said that the Bishop did not really adventure his capital at all. Under the terms of the policy the capital was in any event to be returned to him. The insurance risk involved was the risk whether the nominee under the policy would survive the education period or not. The question was whether the payments made by the Insurance Company constituted an annuity liable to income tax within the Income Tax Acts. Here the position was not so much that the principal sum was repaid by means of the annuity as that it was never parted with. In the case of a life annuity the principal sum was of necessity parted with and disappeared. Here the principal was never lost sight of. It was always there and was repaid in certain events without interest, in other events with interest. The appeal must succeed and the Case go back to the Commissioners in order to decide what portions of these payments consisted of interest, on which alone income tax was payable.

The Inspector of Taxes appealed.

Sir Boyd Merriman K.C. and *R. P. Hills* for the appellant. The result of such a policy as this is that the child cannot sue on it and that the assured does not constitute himself a trustee for his child: *In re Engelbach's Estate.* (1) The annuity when received is the assured's property. He could have received the money and put it in his own pocket. The Bishop is therefore liable to be taxed under Case III. of Sch. D to the Income Tax Act, 1918, on the annuity. This is not a case in which the principle of *Scoble* v. *Secretary of*

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(1) [1924] 2 Ch. 348.

State in Council for India (1) applies. There an antecedent debt existed, and *Foley* v. *Fletcher* (2) shows when this is so the position is entirely different. The whole point in Watson B.'s judgment in the latter case was that a debt repaid in instalments cannot be taxed: see also *Coltness Iron Co.* v. *Black.* (3) The whole test is whether the payments are repayments of a fixed sum: *Chadwick* v. *Pearl Life Insurance Co.* (4) Here it is not possible to say that a lump sum was paid by the Bishop. There has been nothing but the ordinary payments of premiums on an insurance policy. It makes no difference that the premiums are larger because there is a better chance of salvage. It is impossible to say that at the time of entering into the contract, repayment of any fixed sum was in contemplation. *Gould* v. *Curtis* (5) shows that the fact that a deferred annuity is paid by reference to actuarial considerations does not prevent tax being payable. There is nothing to prevent a person selling his property for an annuity: *Jones* v. *Inland Revenue Commissioners.* (6)

Latter K.C. and *Cyril King* for the respondent. Income tax is a tax on profits or gains and not on capital. The profit here is the difference between the premiums paid and the amounts received, and it is admitted that tax is payable on the difference. "An annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity": per Watson B. in *Foley* v. *Fletcher.* (7) This is not the case of a purchase of an annuity. A distinction is drawn between capital and interest. If the child lives till he is twenty-one the money is to be repaid with interest; if not, then it is to be repaid without interest. In the event of the child's death under twenty-one repayment could have been claimed as in respect of a debt. In *Leeds Permanent*

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(1) [1903] 1 K. B. 494; [1903] A. C. 299.

(2) (1858) 3 H. & N. 769; 28 L. J. (Ex.) 100.

(3) (1881) 6 App. Cas. 315.

(4) [1905] 2 K. B. 507.

(5) [1912] 1 K. B. 635.

(6) [1920] 1 K. B. 711.

(7) 3 H. & N. 784, 785.

Benefit Building Society v. *Mallandaine* (1) combined payments of principal and interest were made, and it might in that case just as well as here have been argued that the payments were an annuity, but tax on the interest only was held payable. The payments have to be disintegrated and income tax paid on the part that represents income only: see also *East Indian Ry. Co.* v. *Secretary of State in Council of India* (2), which resembles *Scoble's* case. (3) Here the capital was never at stake, and all that the respondent received was the return of the capital with compound interest. There is a finding in the Case to that effect, so that *Scoble's* case (3) is directly applicable.

[LORD HANWORTH M.R. What would have happened in this case, if all the premiums had not been paid?]

It is not stated in the policy, but the practice was to repay the premiums paid without interest.

[SLESSER L.J. On the terms of the contract, the premiums paid would in such a case have been lost.]

That is so, but the effect of a transaction should not be tested by what would happen if it was not carried out. The real question is whether the annual payments were profits: *Earl Howe* v. *Inland Revenue Commissioners* (4); see also *East Indian Ry. Co.* v. *Secretary of State in Council of India* (2) and *Jones* v. *Inland Revenue Commissioners*. (5) These cases show that in every case regard must be had to what the payments really are. If the reality of the case be regarded, it would not be right to call the policies here contracts for payment of contingent annuities with a possibility of salvage. The essence of the transaction is a payment in instalments of a sum which will in any case be refunded and may be refunded with interest. *Chadwick* v. *Pearl Life Insurance Co.* (6) is really not very relevant here. Life annuities stand by themselves, and it is to them that Watson B. referred as being purchased by a sum of money in *Foley* v. *Fletcher*. (7) It is substantially true to say of all other contracts for payment of an annual sum made by reference to a term of years that they are in essence loan transactions: see *Winter* v. *Mouseley*. (1) This case falls within the principle of *Foley* v. *Fletcher* (2), and it is well settled that the Court will not disturb a long settled tax decision: *John Smith & Son* v. *Moore* (3); *Great Western Ry. Co.* v. *Bater*. (4)

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(1) [1897] 2 Q. B. 402.
(2) [1905] 2 K. B. 413.
(3) [1903] A. C. 299.
(4) [1919] 2 K. B. 336, 352.
(5) [1920] 1 K. B. 711.
(6) [1905] 2 K. B. 507.
(7) 3 H. & N. 784, 785.

Sir Boyd Merriman K.C. in reply. There is no ground for the suggestion that the Crown are seeking to disturb the law. The whole test is whether there has been the purchase of an annuity or merely an agreement to pay money in instalments with interest. If there has been the purchase of an annuity, as in terms there has been, there is no ground for beginning to examine how much is profit. Case III. makes such a subject-matter taxable. When once it is ascertained that an annuity is being paid the tax fixes, and there is no ground for striking a balance of profit and loss: *Clerical, Medical, and General Life Assurance Society* v. *Carter*. (5) Really the arguments of the other side would apply equally to a life annuity.

Cur. adv. vult.

July 23. LORD HANWORTH M. R. In this case the question has to be determined whether the respondent, the Right Rev. W. W. Perrin, is liable to pay income tax on the total sum of 150*l*. which was received by him in each of the five years 1922–1926.

In those years he was paid two sums of 100*l*. and 50*l*. respectively under two contracts which he had entered into on September 12 and 18, 1912, with an Insurance Company called The Clergy Mutual Assurance Society. The appellant in this Court contends that the respondent is so liable under the terms of the rules applicable to Case III. of Sch. D of the Income Tax Act, 1918. Rule 1 runs: "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same, by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract." This rule reproduces s. 102 of the Income Tax Act, 1842.

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(1) (1819) 2 B. & Ald. 802.

(2) 3 H. & N. 769, 784, 785.

(3) [1921] 2 A. C. 13, 38.

(4) [1922] 2 A. C. 1, 10.

(5) (1889) 22 Q. B. D. 444.

By r. 2 the tax is to be computed "as respects the year of assessment in which the profits or income first arise, on the full amount of the profits or income arising within that year."

It is claimed that the respondent received these two sums of 100*l.* and 50*l.* in the years in question as "an annuity . . . . by virtue of any contract," and so is liable to tax. The question therefore that we have to determine is whether the total sum of 150*l.* in these years was an "annuity." This question is by no means free from difficulty.

The transaction which is embodied in the two contracts of September, 1912, is of a simple nature. The assured, under their terms, respectively, agreed to pay the Assurance Society in each of the six years, 1912–1917, 33*l.* 7*s.* 6*d.* and 90*l.* 15*s.* 10*d.*, and in return he was to receive in 1920 and in the four subsequent years 50*l.* under the first and in 1920 and in the six subsequent years 100*l.* under the second contract.

These moneys were to be paid to the "nominees" in the schedules to the contracts, who were in fact his daughter and his son, and the purpose of the transaction was to save up and provide for the education of these children.

Both contracts are in like terms, and I will deal more particularly with the later one, which secures the larger sum of 100*l.* as that is the one which has been chiefly discussed before us.

The contract is called "a policy of assurance—Temporary Annuity" and the Society undertakes to pay to the person named in the schedule "the annuity therein described on the dates and during the period on and for which the same is expressed to be payable upon satisfactory proof being given from time to time that on the respective dates, when the said annuity falls due, the nominee on whose life the annuity depends is living and of the title of the person claiming payment of the said annuity." In the schedule there is a special

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condition that in the event of the death of the nominee the total amount of the premiums paid in respect of this assurance under deduction of any amount that may have been received by way of annuity, but without interest, will be paid to the assured, or his representatives or assigns.

For the purposes of the revenue the substance of the matter must be regarded. It matters not whether in the contract it is, or is not, called an annuity. If in truth and in fact it is an annuity, no dressing of the transaction can alter its character.

Stripped of its form, the transaction is a method of saving up money for future use. It is a method whereby upon a series of payments being made provision for the repayment of a series of larger sums at a later date can be secured.

We are told in the Case—para. 5—that the sums payable under each of the policies are calculated so as to return to the respondent, in the event of the nominee living, the amount which the respondent had paid to the Society with compound interest at 3 per cent. It is not a transaction which has to be based upon actuarial calculations of the expectation of life. If the contract is carried out, the sums paid in at the earlier date are paid out at the later date, with the accretion of the compound interest. If the nominee dies at any time before the conclusion of the deferred payments, the total amount of the premiums paid, subject to a deduction of any sums that may have been paid out by the Society, is repaid to the assured.

There is no provision in the contracts for the repayment to the assured of any sums that he may have paid, if from any cause, whether by death or otherwise, he fails to continue his payments.

The evidence before the Commissioners shows that the possibility of such a failure to continue the payments does not enter into the calculation; and we were told that in practice, the sums already paid would in such an event be repaid without interest to the assured or his personal representatives. It is clear, however, that if the terms of the contracts are carried out, or if some or all of the payments are made but the nominee dies, the assured does not lose but receives his capital back. The transaction appears to me to be one that could be as well done by a bank after reference to an ordinary compound interest table, or perhaps more appropriately to a table that gives the rates to be paid for the redemption of capital by annual payments. In figures, under the son's policy, which has been most closely scrutinized, the assured pays to the Society a sum which in 1917 reaches the total of 544*l.* 14*s.* and receives back in the course of the years of payment, 1920–1926, a total sum of 700*l.*

No protest is raised by the respondent against his being assessed to income tax in respect of the margin between these two sums, which may be treated as profit upon the payments made by him, and which the learned judge has directed to be assessed to tax in accord with *Scoble's* case (1), to which I must refer at greater length hereafter.

It has been decided that under such contracts as these, the assured alone is interested. There is no trust in favour of the nominee: see *Cleaver* v. *Mutual Reserve Fund Life Association* (2) and *In re Engelbach's Estate* (3); and if the assured died before the completion of the contract, the moneys payable under it would fall into his estate.

Has then the assured thus secured for himself an annuity within the rules above quoted?

As was said by Stirling L.J. in *Scoble* v. *Secretary of State in Council for India* (4) the principle laid down in *Foley* v. *Fletcher* (5) "as to the construction of the word 'annuity' has never been departed from."

Foley v. *Fletcher* (5) was decided in 1858. An interest in certain mines was sold by the plaintiff for a sum, a part of which was to be paid down, and the balance by instalments spread over a number of years. The purchaser claimed to deduct income tax. It was held that these instalments were not chargeable with income tax under s. 102 of the Income Tax Act, 1842, which was the predecessor of the Rules now relied upon. It was decided that they were not "annuities" or "annual payments payable as a personal debt or obligation by virtue of any contract." The Income Tax Acts were carefully considered, and Pollock C.B. dealt with the phrases in them as referring to profits in contradistinction to capital, and held that the annuities or annual payments must be read as excluding payments by virtue of a contract to repay a debt. His words are (1): "All the provisions of this Act taken together announce its meaning, that it is to attach upon profits and not upon the return of capital or any payment of that kind in any shape, unless it is stated to be the purchase of an annuity. If that be really the transaction, then, no doubt, the arrangement falls within the Act." Bramwell B. says (2) that the presumption is that the payment to be made is partially what may be called principal and partially what may be called interest: "Well, viewing the case a priori, without reference to the statute which imposes the duty, it would be a reasonable thing to ascertain how much is for interest and how much for principal, and then to impose the duty on the former only." He agrees that that cannot be done and he holds that the payment is not charged under the Acts.

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(1) [1903] 1 K. B. 494; [1903] A. C. 299.
(2) [1892] 1 Q. B. 147.
(3) [1924] 2 Ch. 348.
(4) [1903] 1 K. B. 494, 502.
(5) 3 H. & N. 769; 28 L. J. (Ex.) 100.

Watson B. gives (3) his well known definition: "annuities means, that where the annuity may be purchased with money the capital is gone and ceases to exist, and consequently, the person to be charged is the person receiving the annuity, that is, the yearly sum, year by year . . . . No capital is taxed there, because the principal has been converted into an annuity, and the annuity is chargeable."

In 1903 *Scoble's* case (4) was decided in the Court of Appeal. The Court held that the annual payments which represented partly the purchase price of the Great Indian Peninsula Railway, and partly interest on the purchase price remaining unpaid, were not taxable as a whole, but that tax fell only on the part representing interest. It was argued for the Crown that the principal sum had been sunk precisely as in the case of the

(1) 28 L. J. (Ex.) 105.
(2) Ibid. 107.
(3) 28 L. J. (Ex.) 109.
(4) [1903] 1 K. B. 494.

purchase of an annuity in the market. (1) Vaughan Williams L.J. says that the mode of payment, though called an annuity, is really the purchase price of the railway by annual instalments plus interest on the amount remaining unpaid. Stirling and Mathew L.JJ. both say that the transaction is to be looked at : "It is apparent on the face of the transaction that each instalment covers payment of a principal sum as well as interest, and this case closely resembles that of the repayment by instalments of a loan," (2) which admittedly were not taxable. In the House of Lords (3) the judgment of the Court of Appeal was affirmed. The difficulties which the argument of Sir R. Finlay presented were acknowledged ; but Lord Halsbury felt at liberty to analyse the transaction to see whether the annual sum was partly capital or to be treated as income ; and then added (4) : "I do not think it was the intention of the Legislature to tax capital, and therefore the claim as against part of those sums fails." The result was that it was ordered that only so much of the payments as represented interest was to be taxed.

Now in my judgment the effect of this case is to justify an examination of the annual payment, to ascertain whether it contains capital as well as interest. It allows what Bramwell B. had indicated in *Foley* v. *Fletcher* (5) : "It would be a reasonable thing to ascertain how much is for interest and how much for principal."

I agree with Rowlatt J. that there is no simple touchstone to be applied—such as that there was or was not a pre-existing debt. In *Chadwick* v. *Pearl Life Insurance Co.* (6) Walton J. expresses the opinion that it makes no difference whether the contract to make the annual payments is entered into in consideration of money paid, or in consideration of property assigned ; and I agree with his observations that there will be cases of difficulty.

This course of ascertaining what the annual payment really is was adopted by Rowlatt J. in *Jones* v. *Inland*

(1) [1903] 1 K. B. 500.
(2) Ibid. 504, per Stirling L.J.
(3) [1903] A. C. 299.
(4) [1903] A. C. 303.
(5) 28 L. J. (Ex.) 107.
(6) [1905] 2 K. B. 507, 515.

Revenue Commissioners (1), where he decided that sums received in respect of a royalty on the sales of a patented apparatus, in addition to certain specified payments of a capital nature, were income.

In *Gould* v. *Curtis* (2) Hamilton J. had to determine whether a premium paid upon a policy of insurance was paid in respect of an insurance on life so as to come within the relief from tax given to such a premium by s. 54 of the Income Tax Act, 1853. The policy provided for payment to the assured of 100*l.* on his death within fifteen years and of 200*l.* if he was alive at the end of that period. The premium was calculated actuarially on a series of alternative risks, and the risk was estimated by actuarial calculations based on a recognized table of mortality. Upon these facts Hamilton J. held that it was an insurance on life and not a contract for a deferred payment only. In the course of his judgment he said (3) "that 'insurance' and 'annuity' are words not of scientific law but of common business." This statement affords an additional justification for the examination of the facts to ascertain the nature and business meaning of the contract made.

Another interesting test was suggested by Mr. King on the authority of the case of *Winter* v. *Mouseley* (4), which was cited to the House of Lords by Sir R. Finlay in *Scoble's* case. (5) The question was whether a bond was an annuity bond within the terms of 49 Geo. 3, c. 121, s. 17, and Best J. said that he understood the meaning of an annuity to be when the principal is gone for ever and it is satisfied by periodical payments.

In the present case, as I have pointed out, the loss of the payments by the assured was never taken into account in estimating the terms of the bargain between the assured and the Society, so that principal was never "gone."

For these reasons I am of opinion that the reasoning and judgment of Rowlatt J. was right and should be affirmed. I do not think it is right to treat the sums that the assured is to receive in the years 1920–1926 as "salvage." They are payments in respect of the total of his capital sums paid to the society which have never been lost sight of and were never taken as at risk in the terms of the bargain made with him.

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(1) [1920] 1 K. B. 711, 715.
(2) [1912] 1 K. B. 635.
(3) [1912] 1 K. B. 643.
(4) 2 B. & Ald. 802.
(5) [1903] A. C. 299, 302.

The analysis or dissection ordered by Rowlatt J. ought to be made.

The view that I have taken is to follow what I conceive to be the method directed in *Scoble's* case. (1) Each case must be examined on its own data. I do not feel at all pressed with the observations that the effect of the decision will be to release all annuities for a fixed term of years from income tax. The immunity will be given only in proper cases in which an attempt is being made wrongly to tax capital under statutes which are intended to charge income and income only, for, as was said by Bramwell B. in *Foley* v. *Fletcher* (2)—cited by Scrutton L.J. in *Lord Howe's* case (3)—it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it. The appeal is dismissed with costs.

LAWRENCE L.J. The question in this case is whether certain sums of money paid to the respondent under two policies effected by him with the Clergy Mutual Assurance Society were annuities or other annual payments payable as a personal debt or obligation by virtue of a contract within the meaning of r. 1 of the Rules applicable to Case III. of Sch. D of the Income Tax Act.

This question is one of general importance, as both the policies are in a form which has been in common use for many years in cases where parents with slender means have wanted to make a provision for the education of their children. The Crown has hitherto not claimed income tax on the sums payable under policies of this kind and the Assurance Companies have not hitherto deducted income tax from the payments made thereunder.

(1) [1903] 1 K. B. 494.
(2) 3 H. & N. 783.
(3) [1919] 2 K. B. 336, 353.

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In the present case the policies were taken out nearly seventeen years ago. Under the policy effected by the respondent for the purpose of providing for the education of his son Michael, the Assurance Company has made seven yearly payments of 100*l.* each commencing on September 19, 1920 (when Michael attained the age of fifteen), and ending on September 19, 1926 (when he attained the age of twenty-one). Under the policy effected by the respondent for the purpose of providing for the education of his daughter Margaret, the Assurance Company has made five yearly payments of 50*l.* each commencing on September 13, 1920 (when Margaret attained the age of thirteen), and ending on September 13, 1924 (when she attained the age of seventeen). The premiums payable by the respondent under his son's policy were six yearly sums of 90*l.* 15*s.* 10*d.* each in the years 1912 to 1917, making a total sum of 544*l.* 15*s.*, and under his daughter's policy six yearly sums of 33*l.* 7*s.* 6*d.* each during the same period, making a total sum of 200*l.* 5*s.* The amount of the annual payments assured to the respondent was calculated on the basis of returning to him the sums which he had paid in premiums with compound interest at 3 per cent. per annum.

The Crown now seeks to assess the respondent under Sch. D to income tax in respect of the sums paid to him by the Assurance Company under both policies during the five years ending April 5, 1926, with the result, if the Crown's claim be well founded, that long after the respondent has expended the money received by him under the policies on the education of his children he will have to pay a tax which exceeds in amount the compound interest on the money which he paid to the Assurance Company. Thus the respondent, and all other parents in a similar position, would have been far better off if they had not effected any such policies at all but had kept the money expended in premiums in a safe or deposited it in a bank.

This result is said by the Crown to have been brought about by the form in which these policies are framed. The importance of the question is apparent because, if the contention of the Crown be right, it is entitled to make similar claims against a large class of subjects who relying on the practice not to charge income tax which has prevailed for upwards of twenty years, have adopted this method of making what they believed to be an economic provision for the education of their children.

Whatever may be the result, however, it is the duty of the Court to give effect to the claim now made by the Crown if it be justified by the provisions of the Act.

The case presented by counsel on behalf of the Crown is extremely simple. They contended that the effect of the contract as expressed in each policy was that the respondent for a money consideration agreed to purchase a deferred annuity for a fixed term, and that, as (according to the decision in *In re Engelbach's Estate* (1)), such annuity was payable to the respondent for his personal use, it became chargeable with income tax.

Counsel for the respondent, on the other hand, whilst not challenging the effect of the decision in *In re Engelbach's Estate* (1), contended that the substance of the contract was that the Assurance Company undertook to repay to the respondent the amount paid by him in premiums together with compound interest thereon at the rate of 3 per cent. per annum in instalments at certain fixed dates, and that therefore he was only liable to be assessed to income tax in respect of so much of each instalment as represented interest, the balance of such instalments representing repayments of capital, which were not chargeable with income tax.

It is clearly settled that not every annual payment payable as a personal debt or obligation by virtue of a contract is "an annuity or annual payment" within the meaning of r. 1 of the Rules applicable to Case III. For instance, if a creditor were to agree with his debtor to accept payment of an existing debt by annual instalments, such annual instalments would not be "annual payments" within the rule.

Further, *Foley* v. *Fletcher* (2) and *Scoble's* case (3) show that, even although there may be no debt antecedent to the

(1) [1924] 2 Ch. 348.
(2) 3 H. & N. 769.
(3) [1903] A. C. 299.

contract creating the obligation to pay the annual instalments, yet the Court will inquire into the nature of the transaction and, if the true result of the contract be that the instalments represent payments of capital as well as interest, only so much of each instalment as represents interest will be charged with income tax.

In *Foley* v. *Fletcher* (1) part of the purchase money for an estate was agreed by the conveyance to be paid by annual instalments of fixed amount extending over a period of thirty years, and it was held that such instalments were not chargeable with income tax as "an annuity or other yearly payments." In the course of his judgment Watson B. said (2): "An annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity."

In *Scoble's* case (3) the purchasers of property were given an option to satisfy the purchase money by the payment of an annuity (eo nomine) of fixed amount extending over a long period, and the contract showed on its face that in calculating the amount of the annuity a certain rate of interest was to be used. The House of Lords, affirming the decision of the Court of Appeal, held that only so much of each half-yearly payment of the annuity as represented interest was chargeable with income tax.

The principle upon which both these cases were decided is that it never was the intention of the Income Tax Acts to tax capital as if it were income, with the result that, even although a contract may provide for the payment of annual sums of fixed amount and may call such payments "an annuity," the Court will in each case inquire into the real nature of the transaction, and if it appears that in fact part of such sum represents payment of capital, such part will not be chargeable with income tax. Both these cases however distinctly recognize that in the case of a simple purchase of an annuity in consideration of a money payment the full amount of the annuity is chargeable with income tax.

(1) 3 H. & N. 769.

(2) 3 H. & N. 784.

(3) [1903] A. C. 299.

The distinction which is apparently drawn in these cases is between a purchase of an annuity for a fixed term in consideration of the payment of a sum of money and a contract to pay an annuity in consideration of the conveyance of land or other property, although the money value of such land or other property is by the contract agreed upon between the parties. Moreover in *Scoble's* case (1) stress was laid upon the fact that on the face of the contract it appeared that the amount of the annuity was calculated so as to cover the purchase price together with interest on so much thereof as should from time to time remain unpaid.

I agree with the view expressed by Walton J., in *Chadwick* v. *Pearl Life Insurance Co.* (2), that the distinctions thus drawn are fine, and I confess to having some difficulty in appreciating any logical reason for distinguishing between the acquisition of an annuity in consideration of a money payment and the acquisition of an annuity in consideration of money's worth, or between the case where the contract on the face of it shows that the amount of an annuity is calculated on the capital value of the consideration with interest at an agreed rate and the more usual case where the calculation of the amount does not appear on the face of the contract but is in fact made and agreed to between the parties. However that may be, I think that the cases referred to afford ample authority for the proposition that the Court will in each case look at the real nature of the transaction, whatever may be the form in which it is expressed, and will if the circumstances warrant it dissect a payment, even though it be called an annuity, so as to prevent so much of it as represents capital from being charged with income tax.

That brings me to the question what was the real nature of the contract in the present case. On the one hand it is clear that there was no antecedent debt nor any sale and purchase of real estate or other property, whilst on the other hand it is I think equally clear that this is not the case of a simple purchase of a deferred annuity for a term of years,

(1) [1903] A. C. 299.

(2) [1905] 2 K. B. 507.

owing to the provision in the contract that, in the event of the purpose for which the policy was effected failing either wholly or partially, the Assurance Company agreed to repay to the respondent the whole or part (as the case might be) of the money paid by him.

Taking the son's policy, the substance of the bargain (ignoring for a moment the form of the policy) is that (1.) if the son dies before he attains the age of fifteen, the Assurance Company agrees to repay to the respondent without interest the whole of the money paid by him; (2.) if the son dies between the ages of fifteen and twenty-one, the Assurance Company agrees to repay to the respondent without interest the balance of the money paid by him, after deducting therefrom any payments already made by the Assurance Company under the policy; and (3.) if the son lives to attain the age of twenty-one, the Assurance Company agrees to repay to the respondent the whole of the money paid by him with compound interest at the rate of 3 per cent. per annum by seven annual instalments.

If the contract had been expressed in these terms the Crown could not, in my opinion, have supported its present contention. In such a case the respondent would only have been assessable to income tax on the 3 per cent. compound interest payable by the Assurance Company.

Now does the form of the contract preclude the Court from giving effect to what I conceive to be the true nature of the bargain? I confess that I have felt considerable difficulty in making up my mind on this point. There is much force in the contention of the Crown that, if the Court is at liberty to dissect the payments in the present case, there is no logical reason why the same process should not be adopted in every case of the purchase of a deferred annuity for a fixed term of years. The present case, however, differs substantially from a simple purchase of such an annuity. On the face of the policy there is an obligation imposed upon the Assurance Company to repay the premiums in the event of the failure of the purpose for which it was effected, and, although in the present case that purpose has not failed, yet this obligation, coupled with the fact that the amount of the so-called temporary annuity, which was in fact paid, was calculated by agreement between the parties so as to return to the respondent the premiums which he had paid with 3 per cent. compound interest, in my opinion shows that the real nature of the transaction was closely analogous to that of the deposit of money in a bank or of the loan of money, to be returned in any event to the person making the deposit or loan either without or with interest according to whether a certain event might or might not happen.

The mere fact that the policy does not expressly provide for the return of any premiums in the event of the failure of the respondent to pay them all does not, in my opinion, alter the nature of the transaction. It was stated that it was the practice of the Assurance Company in such cases to repay the premiums without interest, but even if that were not so, the only effect would be that the obligation undertaken by the Assurance Company to repay the money paid by way of premiums would only arise when all the premiums had been paid, but that fact would not alter the nature of the obligation when once it had arisen.

On the whole, though not without much hesitation, I have come to the conclusion that the decision of Rowlatt J. was right and that this appeal fails.

SLESSER L.J. This is an appeal from the judgment of Rowlatt J., reversing the findings of the Commissioners for Special Purposes of the Income Tax Acts, in which he held that certain payments made to the Right Reverend William Wilcox Perrin, Bishop of Willesden, as guardian of his son and daughter under agreements with the Clergy Mutual Assurance Society, were not taxable annuities within the meaning of Case III. of Sch. D, r. 1, of the Income Tax Act, 1918.

For the purpose of this judgment, we may take the case of one of the children, the son; the annuity for the daughter raises no different question of principle and falls to be similarly treated.

Assessment under Sch. D in the sum of 100*l.* paid to the appellant in respect of the son has been made for each of the years ending April 5, 1922–26. From this assessment the Bishop unsuccessfully appealed to the Commissioners who confirmed it, but on further appeal, as the result of Rowlatt J.'s judgment, the assessment was disallowed, subject to a revision of the Commissioners for a dissection as between the various sums of 100*l.* paid under the policy and the taxable liability on the interest accruing therefrom. As regards the liability for tax upon this interest no question arises before us.

The question which has to be considered in this case resolves itself into whether the moneys paid under the policy of assurance ought or ought not properly to be held to be taxable annuities, and, in effect, the answer must depend upon the nature of the transaction entered into between the Bishop and the Assurance Society. In the policy of assurance, under which the moneys were paid, the description is that of a temporary annuity, but this fact is inconclusive of the true nature of the agreement, and, if in fact it be not an annuity, as that word is to be understood in the appropriate provisions of the Income Tax Acts, the authorities are clear that the mere description of the agreement between the parties as a policy for a temporary annuity will not determine the matter.

I have come to the conclusion, after consideration of the actual arrangement between the parties, that though in description the payment is an annuity, in reality the money paid to the Bishop, as guardian of the nominee, his son, was the repayment of the Bishop's own capital which had been advanced under the form of premiums, for the following reasons:—

The contract between the parties, so far as it is material to this case, provided that in consideration of the assured paying his first premium in respect of the child, and provided that the further premiums were duly paid to the Society—as in fact they were—the Assurance Society would yearly from September 19, 1920, until September 19, 1926, pay the sum

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of 100*l.*, if the nominee, being the Bishop's child, lived so long, to the Bishop as guardian. The instrument contained a further provision that: "In the event of the death of the nominee the total amount of the premiums paid in respect of this insurance, after deduction of any amount that may have been received by way of annuity but without interest, will be paid to the assured or the representatives or assigns of the assured."

The argument which was presented on behalf of the Crown that the payments were in fact taxable annuities resolved itself into this: According to *Foley* v. *Fletcher* (1) the word "annuity" may properly be used where the alleged annuity has been purchased for money and the capital has gone and has ceased to exist (per Watson B. (2)), and Sir Boyd Merriman urges that in the case now under consideration, the original capital of the assured, as represented by the premiums paid, has so gone, and that the subsequent payments to him, which were admittedly annual, were taxable as annuities; for the Bishop, on the other hand, it was contended that the transaction was in the nature of a loan to the Insurance Company and that the assured merely received back his own money in the form of annual payments, and Mr. Latter, for the Bishop, relies on the provisions of the policy which I have already quoted, that, in the event of the death of the nominee the total amount of the premiums paid in respect of the insurance, after deduction of any amount which may have been received by way of annuity, but without interest would be paid back to the assured. In the case where the nominee does not die, as was happily the case before us, para. 5 of the Case stated admits that the amount which the appellant had paid to the Society is to be returned to him, together with compound interest at 3 per cent.

Were the contention of the Crown well founded, there is no doubt, on the authorities, that Sir Boyd Merriman could successfully maintain that this was an annuity, for, other things being equal, the word "annuity" will be given its natural meaning—as we were informed the word appears

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(1) 28 L. J. (Ex.) 100.

(2) 28 L. J. (Ex.) 109.

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in other parts of the Income Tax Acts; but regard must be had to the number of cases in the books which decide without any ambiguity that where the substance of the transaction is in the nature of a loan, although the money is paid back by equal annual instalments with interest to the lender, yet, if his capital has not gone, the mere fact of the repayments being annual does not make such annual payments taxable under the Income Tax Acts.

In the words of Vaughan Williams L.J. in *Scoble* v. *Secretary of State in Council for India* (1): "This mode of payment, though called an annuity, is really the purchase . . . . by annual instalments, plus the interest on the amount remaining unpaid." The decision of the Court of Appeal in *Scoble's* case (1) was affirmed in the House of Lords (2), and Lord Halsbury said: "Looking at the whole nature and substance of the transaction . . . . it is a case in which, under powers reserved by a contract, one of the parties agrees to buy from the other party what is their property, and what is called an 'annuity' in the contract and in the statute is a mode of making the payment for that which had become a debt to be paid by the Government. That introduces this consideration: Was it the intention of the Income Tax Acts ever to tax capital as if it was income? I think it cannot be doubted, upon the language and the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital—as income at all events."

It is not necessary, for the purpose of my judgment, further to consider the cases which have held upon consideration of the substance of the transaction that to treat the annual payments as annuities would result in the taxation of capital —the principle is clear and, in my judgment, the present case falls within that class. Although the liability to repay to the Bishop depends upon the duration of other lives as to the time and method of repayment; in any event, whether the nominee survives or not, equally the capital, as represented by the premiums, is to be returned to the assured.

(1) [1903] 1 K. B. 494, 501.

(2) [1903] A. C. 299, 302.

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Finally, we were pressed with the argument that this was not a case of loan but of true insurance, because the capital of the assured, as represented by the premiums, was in risk of loss until such time as all the premiums are paid—for the policy contains a proviso that further premiums, after the first, are to be paid to the Society at the times specified in the policy, and it is suggested that, if they be not paid, the earlier premiums which had been paid would be lost, but, on consideration I do not think that this argument is at all conclusive. If the nominee die before the obligation to pay the premiums has ceased the money paid is to be returned to the assured equally as in the case where the nominee dies after the liability to pay the premiums has ceased or the annual payments back to the assured have begun—so that it is only in the case where, the nominee being still alive, the assured fails to pay his premiums, a case which amounts to a breach of the conditions under which he pays the instalments of his premiums, that the right to the return of his money is imperilled, and such a risk, on failure to complete his contract, is but a term of the agreement and does not interfere with the essential nature of the transaction which is the advance of his capital.

I am, therefore, of opinion that the sum of money which has been paid under the policy is not a taxable annuity, and, consequently, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Druces & Attlee.*

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June 25, 26, 27, 28 ; *July* 23.

WATT *v.* LONGSDON.

[1928. W. 2092.]

Defamation—Libel—Privilege—Evidence of Malice—Allegations of Husband's Misconduct—Publication to Wife—Company—Voluntary Liquidation—Interest of Directors in Company's Affairs.

The fact that a person to whom defamatory matter is published has an obvious interest in the matter published is not of itself enough to make the publication a privileged communication. In order that such communication may be privileged the person making it must have an interest in the matter communicated, or there must be a duty, legal, moral or social, to make the communication incumbent on the person making it towards the person receiving it.

One B., the foreign manager of a company which carried on business abroad, but was in voluntary liquidation, wrote to the defendant, who was a director and was also the liquidator of the company in England, a letter containing gross charges of immorality, drunkenness and dishonesty on the part of the plaintiff, who was the managing director of the company abroad. The defendant wrote in answer that he had long suspected the plaintiff of immorality, and asked B. whether he could obtain a sworn statement of the matters disclosed in his letter from the persons mentioned therein as his informants, adding that it might " even be necessary to bribe " them, and that he understood that one of them was " a woman of the lowest type on earth—a prostitute all her life " ; that the plaintiff's wife was an old friend of his, and that he would be unfair to an old friend if he did not place the facts before her, but that without a sworn statement he would not speak. Without obtaining any corroboration of the allegations in B.'s letter, and without communicating with the plaintiff, the defendant showed B.'s letter first to S., the chairman of the board of directors and the largest shareholder in the company, and then to the plaintiff's wife. The allegations in B.'s letter were unfounded, but the defendant believed them to be true :—

Held, that the publications to S. and B. were made upon privileged occasions, but that the publication to the plaintiff's wife was not upon a privileged occasion.

Held (by Greer and Russell L.JJ.), that in the circumstances relating to the publications to S. and to B. and to the plaintiff's wife there was evidence of malice which ought to be left to a jury.

Coxhead v. *Richards* (1846) 2 C. B. 569 considered and explained.

Dicta of Lord Campbell C.J. in *Harrison* v. *Bush* (1855) 5 E. & B. 344 ; of Lord Esher M.R. in *Pullman* v. *Hill* [1891] 1 Q. B. 524 ; of Lord Atkinson in *Adam* v. *Ward* [1917] A. C. 309 approved and followed. Dictum of Lindley L.J. in *Stuart* v. *Bell* [1891] 2 Q. B. 341 questioned.

APPEAL from the judgment of Horridge J. in an action tried before the learned judge and a special jury. The action was for libel. The plaintiff was the managing director at Casa Blanca in Morocco of the Scottish Petroleum Company, Ld., which carried on business there and elsewhere. The defendant, a young man under thirty years of age, was a director of the company in England. He had been in Morocco in friendly relations with the plaintiff and his wife. The company went into voluntary liquidation in November, 1927, and the defendant was appointed the liquidator. One E. A. Browne was the manager of the company at Casa Blanca. The chairman of the board of directors in England was W. M. G. Singer. He was also the largest shareholder in the company. On April 30, 1928, while the plaintiff was in Casa Blanca and his wife was in England, E. A. Browne in Casa Blanca wrote to the defendant in England a letter stating that the plaintiff had left Casa Blanca for Lisbon owing certain spirit merchants 88*l.*, and adding: "I doubt very much if these people will ever get paid." The letter also contained the following passages: "Now to come to the amazing tangle. For some few days, that is to say ever since Mr. Watt's liquidation was going on, we had noticed that the housemaid's attitude had completely changed and she was being very familiar with him. I put this down to cheek on the part of a person of that class. . . . . On Saturday afternoon the servant herself called and said she wanted to speak to me privately. My wife and I received her, of course, very coldly and told her that her attitude in demanding money from Mr. Watt was disgusting and we could do nothing for her. Judge of our surprise when she replied that she had been Mr. Watt's mistress for over two months and after all his promises to her she thought herself quite justified in demanding sufficient money to keep her until she could find another job. Of course I asked for details as it seemed too amazing to be true, especially as she is an old woman, stone deaf, almost blind, with dyed hair ! ! ! She was however able to give me a mass of details which left not the slightest doubt and the cook was also able to corroborate the fact that the servant was in the habit of spending part of the night with Mr. Watt. The servant was also able to repeat things about

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the business and intimate things regarding poor Mrs. Watt which she could not have known had the situation been otherwise than that stated. . . . . You will remember that you asked me whether I knew of any other affair beyond the . . . . one and I replied most vigorously that I was quite certain there was no other affair. However at present I have both the cook's and the housemaid's words that he did receive dancing girls, etc., in his flat, and in fact the proprietor of the building had complained of the noise made by these visitors. I am therefore quite certain that orgies of this sort did take place without any doubt whatsoever, which shows Mr. Watt to be a perfect beast and a perjurer, as my statement to you was based on statements which he had made to me. . . . . However the servant states definitely that he spent hours discussing with her the way of compromising my wife and practically asked her to assist him to do so. . . . . From the servant's statement he is vicious and gets into uncontrollable passions brought on by drink and his own inherent vices. The details are too long and too unsavoury for me to write and I only regret that I did not know the true facts before he left as I am certain he would have left a sorrier but wiser man. My wife is, of course, very much upset. She is young, and it never entered her mind that he could have designs on her. All our sympathy goes out to Mrs. Watt who can never hope to be happy again unless she separates herself from a man who has shown himself to be a blackguard, a thief, a liar and to whom friendship was a totally unknown thing, and who lived and lives exclusively to satisfy his own passions and lust. . . . ."

The letter contained a postscript as follows: "From a letter shown to me by Mr. Watt I know how bitterly disappointed Mrs. Watt is and how very much troubled she is. It would therefore perhaps be better not to show her this letter as it could only increase most terribly her own feelings in regard to her husband. These awful facts might be the cause of a breakdown to her and I think she has enough to cope with at the present. Mr. Singer however should perhaps know."

On May 5, 1928, the defendant sent the above letter to Mr. Singer, the chairman of the board of directors in England. On the same day the defendant wrote to E. A. Browne a letter containing the following passages :—

" As you will have gathered accompanying the letter under reply I received your private one regarding Mr. Watt. In the first I am indeed grateful for the trouble you took in writing me at such length on a matter which must be most painful to you, and before I go any further may I express my deep regret that your wife should ever have met and known a man of so base a nature and character as that of this individual. Indirectly he came into your lives through me. . . . . Both of you always through the generosity of your hearts ever ready to befriend those whom you deemed in need, that your kindness and friendship should be so abused is very painful to me. . . . . Passing on to his general conduct outside of your own home, the information vile and sourdid (sic) as it is does not come in any way as a surprise. You have long known I have suspected he was leading a life as has now proved itself. Do not think I am priding myself on such knowledge, far be it, the difficulty with me was to prove it. I merely guessed it, for I had no proof beyond a few slender threads. . . . . There is one whom it concerns very deeply, his poor wife, who is indeed one of the world's best, a woman of the highest honour. To me it is wrong, wicked and I will say cruel, that she, the one most concerned, should be in the dark to these disgusting and degrading happenings. To think the man will return to her and take up his life with her as an innocent and wholesome being is to me too appalling. Surely to God she should be told and give her (sic) the chance to decide what she wishes to do. To me, to hide such facts from a friend, no matter how great or how small a one, is iniquitous. Do not you agree ? In any case, I am going to ask you to do something for me. This woman who has been his mistress is doubtless still in Casa Blanca and also the maid who corroberated (sic) to you the disgusting disclosures the former made. His mistress I understand is one of the lowest type of women on earth

—a prostitute all her life. As a friend of mine, which I truly know you to be, could you obtain a sworn statement of all these happenings. It may be even necessary for you to bribe the women to do such and if only a matter of a few hundred francs I will pay it and of course the legal expenses. I feel this matter very deeply. Mrs. Watt is an old friend of mine and once when dangerously ill she saved my life and therefore there is nothing in this world I would not gladly do to recompense for all she did for me. The circumstances of this case are so appalling that I feel I would be letting down an old friend if I did not place truth and facts before her. Naturally I would not say anything until I had a sworn statement in my possession and only with such proof would I speak, for an interferer between husband and wife nearly always comes off the worst. . . . . In conclusion I just ask you to be good enough to help me in order that I may stand by an old friend who I feel has been treated worse than fit for the vilest harlot on earth. To me it is incredible that any man with a grain of decency could do such a thing. If his mistress had pretences at being a decent individual it might partially be understood but to cohabitate with such a creature is, well beyond words of expression."

On May 14, before getting any sworn statement or any other corroboration of the allegations contained in Browne's letter of April 30, the defendant showed that letter to the plaintiff's wife, with the result that the plaintiff and his wife separated, and the wife instituted proceedings for divorce.

The plaintiff then brought this action alleging publication by the defendant (*a*) to Singer and (*b*) to the plaintiff's wife of Browne's letter of April 30, and publication of the defendant's own letter to Browne of May 5. The defendant did not justify the libels contained in the letters, but pleaded that Browne's letter to him was published to Singer and to the plaintiff's wife in circumstances which made the publications privileged, and that his letter to Browne was written and published in similar circumstances. At the trial the plaintiff put in the defendant's answers to two interrogatories, the effect of which answers was that before publishing Browne's letter of April 30 he took no steps and made no inquiries to ascertain whether the matters alleged therein were true and that he believed all the matters alleged in the said letter were true.

The learned judge ruled that the three publications complained of were all made on privileged occasions and that there was no evidence of malice to go to the jury. He therefore gave judgment for the defendant.

The plaintiff appealed.

T. J. O'Connor K.C. and *C. P. Harvey* for the appellant. First with regard to the publication by the respondent to the appellant's wife of Browne's letter of April 30: The learned judge was wrong in holding, as he did, that "If there is an obvious interest in the person to whom a communication is made which causes him to be a proper recipient of a statement, if that statement is honestly made, then the statement is privileged." Where the person making and the person receiving a communication have a common interest in the subject matter the communication is generally privileged; and so if the person making the communication has an interest in the matter, and the person to whom it is made has a legal moral or social duty to regard and respect that interest. But where there is no common interest, or no interest in one party coupled with at least a social duty upon the other to regard it, there is no privilege: *Harrison* v. *Bush* (1); *Pullman* v. *Hill & Co.* (2); *Adam* v. *Ward* (3), per Lord Atkinson. The learned judge has cited in support of his opinion *Coxhead* v. *Richards* (4), where the mate of a ship wrote to an intimate friend, the defendant, a letter complaining of the danger to which he and other members of the crew were subjected owing to the drunkenness of the captain, the plaintiff; and the defendant sent the letter to the owner of the ship, who thereupon dismissed the plaintiff. The Court of Common Pleas was equally divided upon that case, Tindal C.J. and Erle J. holding that the communication of the letter to the shipowner was privileged, while Coltman and Cresswell JJ. held that it was not. The judgment of the Chief Justice and Erle J. has been repeatedly approved: by Willes J. in *Amann* v. *Damm* (1); by Blackburn J. in *Davies* v. *Snead* (2); and by Lindley L.J. in *Stuart* v. *Bell*. (3) No doubt the matter contained in that letter gravely concerned the shipowner; but it concerned others as well as him, and therefore *Coxhead* v. *Richards* (4) is not an authority for holding that the interest of the person receiving a communication is of itself sufficient to confer a privilege on the publication. Such authority as there is points to the contrary conclusion. In *Macintosh* v. *Dun* (5), followed in *Greenlands, Ld.* v. *Wilmshurst* (6), a report made by a trade protection society to a tradesman concerning the solvency of the plaintiff was held not to be privileged, notwithstanding the interest of the tradesman in the matter. The test for privilege is the same whether the matter communicated interests the party making or the party receiving the communication, or both parties. It was formulated by Parke B. in *Toogood* v. *Spyring* (7): "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." Is it for the common convenience and welfare of society that a shipowner should be informed of the conduct of his captain which is endangering the lives of his crew? The law has answered that in the case of *Coxhead* v. *Richards* (4) it was. The question whether it is for the common convenience and welfare of society that a wife should be informed of her husband's misconduct is a very different question. It cannot be answered categorically either way. The answer must depend on the circumstances. The relation between the party making and the party receiving the communication; for example, the relation of parent and child, or brother and sister, the relation between cousins, long and intimate friendship; all these may in varying degrees warrant or excuse a communication like that under discussion. The question in this case is whether in the circumstances the common convenience and welfare of society were being served when the respondent handed to Mrs. Watt the letter he had received from Browne. That question has never been answered.

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(1) 5 E. & B. 344.

(2) [1891] 1 Q. B. 524.

(3) [1917] A. C. 309, 334.

(4) 2 C. B. 569.

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(1) (1860) 8 C. B. (N. S.) 597, 602.

(2) (1870) L. R. 5 Q. B. 608.

(3) [1891] 2 Q. B. 341.

(4) 2 C. B. 569.

(5) [1908] A. C. 390.

(6) [1913] 3 K. B. 507; reversed in the House of Lords *nom. London Association for Protection of Trade* v. *Greenlands, Ld.* [1916] 2 A. C. 15, on the ground that the society being unincorporated could not be sued, and that the remaining defendant was acting as a confidential agent.

(7) (1834) 1 C. M. & R. 181, 193.

Next with regard to the respondent's letter to Browne, the contents of which the respondent also published to Mr. Singer; and thirdly with regard to the publication to Singer of Browne's letter of April 30; the learned judge has held that, although by s. 186 of the Companies Consolidation Act, 1908, the powers of the directors of a company cease on the appointment of a liquidator except so far as he sanctions their continuance, nevertheless Browne, Singer, and the respondent had each and all of them a common interest in the affairs of the company and that these publications were therefore privileged. It is submitted that they were not; but if they were, there was ample evidence of malice, which ought to have been left to the jury. The fact that the respondent showed to the appellant's wife Browne's letter without ever communicating with the appellant and without getting any corroboration of the outrageous charges it contained; his offer to pay for a sworn statement supporting them from witnesses whom he knew to be untrustworthy, even if it should be necessary to bribe them; these matters of themselves, apart from the strong, but natural, expressions of disgust and abhorrence at the supposed conduct of the appellant, ought to have been left to the jury.

Stuart Bevan K.C. and *Kenelm Preedy* for the respondent. *Coxhead* v. *Richards* (1) established that the interest of the party receiving a communication may create a privileged occasion. The respondent takes his stand upon the principle of that case, which has been recognized by Willes J. in *Amann* v. *Damm* (2), by Blackburn J. in *Davies* v. *Snead* (3), and by Lindley L.J. in *Stuart* v. *Bell* (4), and which ought to

(1) 2 C. B. 569.

(2) 8 C. B. (N. S.) 597.

(3) L. R. 5 Q. B. 608.

(4) [1891] 2 Q. B. 341.

be supported for the common welfare of society. The principle of that case covers this. The cogency of Mrs. Watt's interest in the matter of Browne's letter was at least equal to that of the shipowner's interest in the mate's letter. The respondent believed the allegations, disgraceful as they were, in Browne's letter; he was an intimate friend of Mrs. Watt and under a great obligation of gratitude towards her. He felt that to hear and believe the imputations upon her husband, and to lie by mute and inactive, was a cowardly betrayal of one who was entitled to his sympathy and support. If a reciprocal duty upon the party making a communication is necessary to create a privilege, surely there was here a duty more exigent than any duty owed by Richards towards the shipowner. All that is necessary to create a privileged occasion is a state of things which explains why the communication was made and thereby shows that it was not the outcome of mere malice or perversity, and that the presumption of malice is not warranted. The presumption is easily displaced. It rests on the questionable position that defamatory matter is generally published without just cause or excuse. Accordingly as soon as the defendant shows that there is a fair and reasonable explanation of his act in publishing the defamatory matter, the presumption of malice is rebutted. Then to entitle the plaintiff to succeed he must adduce evidence more consistent with the existence of malice than with its absence: *Somerville* v. *Hawkins*. (1) It cannot be said that the respondent's conduct in showing Browne's letter to Mrs. Watt was more consistent with malice than with perfect good faith; and the learned judge was right in holding that this publication was upon a privileged occasion.

With regard to the other publications—namely, those to Mr. Singer and to Browne, it is admitted in the statement of claim that the respondent, Singer, and Browne were all engaged in the business of the company, and of course they were interested in its affairs notwithstanding the fact that it was in voluntary liquidation. It is clear therefore that these publications were made upon privileged occasions.

(1) (1851) 10 C. B. 583, 590.

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There remains the question of malice. Strong expressions used in the respondent's letter cannot be relied on as evidence of malice. It is common ground that he believed the allegations in Browne's letter; if they were true they warranted the strongest expression of disapproval. The Court will not be at pains to find evidence of malice, nor astute in discovering it. As Lord Dunedin says in *Adam* v. *Ward* (1): "When considering whether the actual expression used can be held as evidence of express malice no nice scales should be used"; and what applies to the expression should equally apply to the circumstances in which it is uttered.

O'Connor K.C. in reply.

Cur. adv. vult.

July 23. The following written judgments were delivered:—

SCRUTTON L.J. This case raises, amongst other matters, the extremely difficult question, equally important in its legal and social aspect, as to the circumstances, if any, in which a person will be justified in giving to one partner to a marriage information which that person honestly believes to be correct, but which is in fact untrue, about the matrimonial delinquencies of the other party to the marriage. The question becomes more difficult if the answer in law turns on the existence or non-existence of a social or moral duty, a question which the judge is to determine, without any evidence, by the light of his own knowledge of the world, and his own views on social morality, a subject matter on which views vary in different ages, in different countries, and even as between man and man.

The Scottish Petroleum Company, which carried on business, amongst other places, in Morocco, had in Casa Blanca, a port in Morocco, a manager named Browne, and a managing director named Watt. The company had in England a chairman named Singer, who held a very large proportion of shares in the company, and also another director, Longsdon, a young man under thirty years of age. The latter had been in Morocco in business and friendly relations with Watt and Browne, and was a friend of Mrs. Watt, who had nursed him in an illness. The company went into voluntary liquidation in November, 1927, and Longsdon was appointed liquidator. In April, 1928, Mrs. Watt was in England, and her husband in Casa Blanca. It is not clear, and there is no evidence, what the effect of the liquidation had been on the actual employment of Watt and Browne, that is, whether they, or either of them, still received a salary. Watt's directorship was, under the Companies Act, in a state of suspended animation. Under these circumstances Longsdon in England received at the beginning of May from Browne in Casa Blanca a letter stating that Watt had left for Lisbon to look for a job, that he had left a bill for 88*l.* for whisky unpaid, and that he had been for two months in immoral relations with his housemaid, who was now publicly raising claims against him for money matters. The woman was described as an old woman, stone deaf, almost blind, and with dyed hair. A number of details were given which Browne said Watt's cook had corroborated. The information was mixed up with an allegation that Watt had been scheming to compromise or seduce Mrs. Browne. The letter concluded: "From a letter shown to me by Mr. Watt I know how bitterly disappointed Mrs. Watt is, and how very much troubled she is. It would therefore perhaps be better not to show her this letter as it could only increase most terribly her own feelings in regard to her husband. These awful facts might be the cause of a breakdown to her, and I think she has enough to cope with at present. Mr. Singer, however, should perhaps know." On May 5, Longsdon, without making inquiries, sent Browne's letter on to Singer, the chairman of the board of directors. At the trial Watt's counsel put in Longsdon's answer to interrogatory 5 that he believed the statements in the letter to be true. On May 5 Longsdon wrote a long letter to Browne, in which he said that he had long suspected Watt's immorality, but had no proof; that he thought it wicked and cruel that Mrs. Watt, a very old friend of the writer's, should be in the dark when Watt might return to her—did not Browne agree?—that he

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(1) [1917] A. C. 309, 330.

(Longsdon) would not speak until he had a sworn statement in his possession, "and only with such proof would I speak, for an interferer between husband and wife nearly always comes off the worst." Could Browne get a sworn statement ? "It may even be necessary for you to bribe the women to do such, and if only a matter of a few hundred francs I will pay it and of course the legal expenses." Longsdon's letter describes one of the women who was to make this sworn statement as "a prostitute all her life," a description not contained in Browne's letter. Watt returned to England in May. Without waiting for the sworn statement, on May 12, Longsdon sent the letter to Mrs. Watt. Mr. and Mrs. Watt separated, and Mrs. Watt instituted proceedings for divorce, which apparently are still pending.

Mr. Watt then instituted proceedings against Longsdon for libel—namely (1.) the publication of Browne's letter to Singer; (2.) the publication of the same letter to Mrs. Watt; (3.) Longsdon's letter of May 5 to Browne. The claim alleged: "The plaintiff, the defendant, and one E. A. Browne were at all material times in the employment in Morocco of the Scottish Petroleum Company, Ld., a company now in liquidation, of which one W. M. G. Singer was chairman and had a controlling interest therein," and the defence admitted it: "The facts alleged in paragraph 1 of the statement of claim are admitted." The plaintiff also put in at the trial the defendant's answers to interrogatories that his only information on the subject was derived from Browne's letter, that he made no further inquiries, and that he believed that all the statements in Browne's letter, and in the defendant's letter of May 12 were true. The defendant did not justify, but pleaded privilege. The case was tried before Horridge J. and a jury. The learned judge held that all three publications were privileged, and that there was no evidence of malice fit to be left to the jury. He therefore entered judgment for the defendant. The plaintiff appeals.

The learned judge appears to have taken the view that the authorities justify him in holding that if "there is an obvious interest in the person to whom a communication is made which causes him to be a proper recipient of a statement," even if the party making the communication had no moral or social duty to the party to whom the communication is made, the occasion is privileged. He derives this from the opinions of Tindal C.J. and Erle J. in *Coxhead* v. *Richards* (1) as approved by Willes J. in *Amann* v. *Damm* (2); and by Blackburn J. in *Davies* v. *Snead* (3), and especially from the approval of these decisions, and the citation of the judgment of Erle C.J. in *Whiteley* v. *Adams* (4), by Lindley L.J. in *Stuart* v. *Bell.* (5) He has therefore found in the present case that the occasion of each of the three communications, to Singer, to the wife, and to Browne, was privileged, and that there is no evidence of excess of communication or of malice to be left to the jury. "No nice scales should be used," as Lord Dunedin said in *Adam* v. *Ward.* (6)

By the law of England there are occasions on which a person may make defamatory statements about another which are untrue without incurring any legal liability for his statements. These occasions are called privileged occasions. A reason frequently given for this privilege is that the allegation that the speaker has "unlawfully and maliciously published," is displaced by proof that the speaker had either a duty or an interest to publish, and that this duty or interest confers the privilege. But communications made on these occasions may lose their privilege: (1.) they may exceed the privilege of the occasion by going beyond the limits of the duty or interest, or (2.) they may be published with express malice, so that the occasion is not being legitimately used, but abused. A very careful discussion of the way in which these two grounds of loss of privilege should be considered will be found in Lord Dunedin's judgment in *Adam* v. *Ward.* (7) The classical definition of "privileged occasions" is that of Parke B. in *Toogood* v. *Spyring* (8), a case where the tenant of a farm complained to the agent of the landlord, who had sent a

(1) 2 C. B. 569.
(2) 8 C. B. (N. S.) 597, 602.
(3) L. R. 5 Q. B. 608.
(4) (1863) 15 C. B. (N. S.) 392.
(5) [1891] 2 Q. B. 341.
(6) [1917] A. C. 309, 330.
(7) [1917] A. C. 329.
(8) 1 C. M. & R. 181.

workman to do repairs, that the workman had broken into the tenant's cellar, got drunk on the tenant's cider, and spoilt the work he was sent to do. The workman sued the tenant. Parke B. gave the explanation of privileged occasions in these words (1): "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." It will be seen that the learned judge requires: (1.) a public or private duty to communicate, whether legal or moral; (2.) that the communication should be "fairly warranted by any reasonable occasion or exigency"; (3.) or a statement in the conduct of his own affairs where his interest is concerned. Parke B. had given several other definitions in slightly varying terms. For instance, in *Cockayne* v. *Hodgkisson* (2) he had directed the jury "Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication." This adds to the protection of his own interest spoken of in *Toogood* v. *Spyring* (1) the protection of the interests of another where the situation of the writer requires him to protect those interests. This, I think, involves that his "situation" imposes on him a legal or moral duty. The question whether the occasion was privileged is for the judge,

(1) 1 C. M. & R. 181, 193.

(2) (1833) 5 C. & P. 543, 548.

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and so far as "duty" is concerned, the question is: Was there a duty, legal, moral, or social, to communicate? As to legal duty, the judge should have no difficulty; the judge should know the law; but as to moral or social duties of imperfect obligation, the task is far more troublesome. The judge has no evidence as to the view the community takes of moral or social duties. All the help the Court of Appeal can give him is contained in the judgment of Lindley L.J. in *Stuart* v. *Bell* (1): "The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff." Is the judge merely to give his own view of moral and social duty, though he thinks a considerable portion of the community hold a different opinion? Or is he to endeavour to ascertain what view "the great mass of right-minded men" would take? It is not surprising that with such a standard both judges and text-writers treat the matter as one of great difficulty in which no definite line can be drawn. I refer to the judicial recognition of the difficulty cited in Fraser on Libel, 6th ed., pp. 183 to 186, the late Mr. Blake Odgers' book on Libel, 6th ed., p. 220, and Mr. Gatley's book, 2nd ed., p. 252. A conspicuous instance of the difficulties which arise when judges have to determine the existence of duties, not legal, but moral or social, by the inner light of their own conscience and judgment and knowledge of the world, is to be found in the case of *Coxhead* v. *Richards*. (2) A correct appreciation of what was the difference of opinion in that case is, in my opinion, of great importance in the decision of the present case. The short facts were that Cass, the mate of a ship, wrote to Richards, an intimate friend of his, a letter stating that on a voyage from the Channel to Wales, which was going to continue to Eastern ports, the captain, Coxhead, had by his drunkenness endangered the safety of the ship, and the lives of the crew; and Cass asked Richards' advice what he should do in view of the risk of repetition of this danger on the voyage to the East. Richards, after consulting " an Elder Brother of the Trinity House, and an eminent shipowner," sent this letter to Ward, the owner of the ship. Richards did not know Ward, and had no interest in the ship. The owner dismissed the captain, who thereupon brought an action against Richards. The judge at the trial directed the jury, if they should think that the communication was strictly honest, and made solely in the execution of what he believed to be a duty, to find for the defendant. They did so, while finding that the plea of justification failed. The plaintiff then moved for a new trial, on which motion the Court after two hearings was equally divided. It is not very clear whether the judges differed on a general principle, or on its application to the facts of the case. I understand Tindal C.J. to have taken the view that if a man has information materially affecting the interests of another, and honestly communicates it to that other, he is protected, though he has no personal interest in the subject matter (1), and that his protection arises from " the various social duties by which men are bound to each other," and that it was the duty of the defendant to communicate this information to the owner. (2) Erle J. appears to put the matter on " information given to protect damage from misconduct," " the importance of the information to the interest of the receiver," and says that a person having such information is justified in communicating it to the person interested, though the speaker did not stand in any relation to the recipient, and was a volunteer. He does not expressly refer to any social duty. On the other hand, Coltman and Cresswell JJ. both appear to me to hold that in such circumstances there was no moral duty (3), for that any tendency that way was counterbalanced by the moral duty not to slander your neighbour. In the subsequent case of *Bennett* v. *Deacon* (1) the same four judges repeated the same division of opinion, where Deacon, a man to whom the plaintiff owed 25*l.*, volunteered to a tradesman, who was about to deal with the plaintiff, the statement that unless the tradesman was paid ready money he would lose the goods, and his money, or price, for he (Deacon) was about to seize the goods of the plaintiff for debt. I think it is clear that Tindal C.J. and Erle J. thought that a volunteer, with no personal interest, would be protected in giving information apparently material to the interest of the recipient, and that Coltman and Cresswell JJ. thought he would not. How far either set of judges meant to lay down a general principle applicable to all such cases is not very clear. They certainly differed in its application to the particular facts of those cases. I myself should have thought, and I think most of the judges who have considered the case, as for instance Willes J. in *Amann* v. *Damm* (2) and Lindley L.J. in *Stuart* v. *Bell* (3) did think, that in the particular facts of *Coxhead* v. *Richards* (4) Richards, if he believed the statements in the letter to be true, had a moral duty to forward them to the shipowner, who had obviously a vital interest in them, if they were true. In 1855, in *Harrison* v. *Bush* (5), Lord Campbell C.J. giving the judgment of the Court of Queen's Bench accepted a principle stated thus: "A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." This is the first of a series of statements that both parties, the writer and the recipient, must have a corresponding interest or duty. Lord Esher M.R. says in *Pullman* v. *Hill & Co.* (6): "An occasion is privileged when the person who

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(1) [1891] 2 Q. B. 341, 350.

(2) 2 C. B. 569.

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(1) 2 C. B. 596.
(2) 2 C. B. 598.
(3) 2 C. B. 601, 604.

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(1) (1846) 2 C. B. 628.
(2) 8 C. B. (N. S.) 602.
(3) [1891] 2 Q. B. 347.
(4) 2 C. B. 569.
(5) 5 E. & B. 344, 348.
(6) [1891] 1 Q. B. 524, 528.

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makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged." Lord Atkinson in *Adam* v. *Ward* (1) expresses it thus : "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential." With slight modifications in particular circumstances, this appears to me to be well established law, but, except in the case of communications based on common interest, the principle is that either there must be interest in the recipient and a duty to communicate in the speaker, or an interest to be protected in the speaker and a duty to protect it in the recipient. Except in the case of common interest justifying intercommunication, the correspondence must be between duty and interest. There may, in the common interest cases, be also a common or reciprocal duty. It is not every interest which will create a duty in a stranger or volunteer. This appears to fit in with the two statements of Parke B. already referred to (2), and with the language of Erle C.J. in *Whiteley* v. *Adams* (3), that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it. This is approved by Lindley L.J. in *Stuart* v. *Bell* (4), but I think should be expanded into "either (1.) a duty to communicate information believed to be true to a person who has a material interest in receiving the information, or (2.) an interest in the speaker to be protected by communicating information, if true, relevant to that interest, to a person honestly believed to have a duty to protect that interest, or (3.) a common interest in and reciprocal duty in respect of the subject matter of the communication between speaker and recipient." If *Macintosh* v. *Dun* (1) is rightly decided the duty to communicate does not arise where the communication is made in pursuance of a contract made for the private gain of the speaker. But after the decision of the House of Lords in *London Association for Protection of Trade* v. *Greenlands, Ld.* (2) *Macintosh* v. *Dun* (1) must not be relied on too strongly.

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(1) [1917] A. C. 309, 334.
(2) 1 C. M. & R. 193 ; 5 C. & P. 548.
(3) 15 C. B. (N. S.) 392, 418.
(4) [1891] 2 Q. B. 341, 348.

Lastly, in *Stuart* v. *Bell* (3) there was again a difference of opinion, though not an equal division of the judges, as in *Coxhead* v. *Richards*. (4) Stanley, the explorer, and his valet, Stuart, were staying with the mayor of Newcastle, Bell. The Edinburgh police made a very carefully worded communication to the Newcastle police that there had been a robbery in Edinburgh at an hotel where Stuart was staying, and it might be well to make very careful and cautious inquiry into the matter. The Newcastle police showed the letter to the mayor, who after consideration showed it to Stanley, who dismissed Stuart. Stuart sued the mayor. Lindley and Kay L.JJ. held that the mayor had a moral duty to communicate, and Stanley a material interest to receive the communication; Lopes L.J. held that in the circumstances there was no moral duty to communicate, though in some circumstances there might be such a duty in a host towards a guest. I myself should have agreed with the majority, but the difference of opinion between such experienced judges shows the difficulty of the question.

In my opinion Horridge J. went too far in holding that there could be a privileged occasion on the ground of interest in the recipient without any duty to communicate on the part of the person making the communication. But that does not settle the question, for it is necessary to consider, in the present case, whether there was, as to each communication, a duty to communicate, and an interest in the recipient.

First as to the communication between Longsdon and Singer, I think the case must proceed on the admission that

(1) [1908] A. C. 390.
(2) [1916] 2 A. C. 15.
(3) [1891] 2 Q. B. 341.
(4) 2 C. B. 569.

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at all material times Watt, Longsdon and Browne were in the employment of the same company, and the evidence afforded by the answer to the interrogatory put in by the plaintiff that Longsdon believed the statements in Browne's letter. In my view on these facts there was a duty, both from a moral and a material point of view, on Longsdon to communicate the letter to Singer, the chairman of his company, who, apart from questions of present employment, might be asked by Watt for a testimonial to a future employer. Equally, I think Longsdon receiving the letter from Browne, might discuss the matter with him, and ask for further information, on the ground of a common interest in the affairs of the company, and to obtain further information for the chairman. I should therefore agree with the view of Horridge J. that these two occasions were privileged, though for different reasons. Horridge J. further held that there was no evidence of malice fit to be left to the jury, and, while I think some of Longsdon's action and language in this respect was unfortunate, as the plaintiff has put in the answer that Longsdon believed the truth of the statements in Browne's and his own letter, like Lord Dunedin in *Adam* v. *Ward* (1), I should not try excess with too nice scales, and I do not dissent from his view as to malice. As to the communications to Singer and Browne, in my opinion the appeal should fail, but as both my brethren take the view that there was evidence of malice which should be left to the jury, there must, of course, be a new trial as to the claim based on these two publications.

The communication to Mrs. Watt stands on a different footing. I have no intention of writing an exhaustive treatise on the circumstances when a stranger or a friend should communicate to husband or wife information he receives as to the conduct of the other party to the marriage. I am clear that it is impossible to say he is always under a moral or social duty to do so; it is equally impossible to say he is never under such a duty. It must depend on the circumstances of each case, the nature of the information, and the relation of speaker and recipient. It cannot, on the one hand, be the duty even of a friend to communicate all the gossip the friend hears at men's clubs or women's bridge parties to one of the spouses affected. On the other hand, most men would hold that it was the moral duty of a doctor who attended his sister in law, and believed her to be suffering from a miscarriage, for which an absent husband could not be responsible, to communicate that fact to his wife (1) and the husband. Hawkins J. in *Kitson* v. *Playfair* (2) did not have to rule on this point because of the finding of the jury as to malice, and, I think, postponed ruling as long as he could. If this is so, the decision must turn on the circumstances of each case, the judge being much influenced by the consideration that as a general rule it is not desirable for any one, even a mother in law, to interfere in the affairs of man and wife. Using the best judgment I can in this difficult matter, I have come to the conclusion that there was not a moral or social duty in Longsdon to make this communication to Mrs. Watt such as to make the occasion privileged, and that there must be a new trial so far as it relates to the claim for publication of a libel to Mrs. Watt. The communications to Singer and Browne being made on a privileged occasion, there must be a new trial of the issue as to malice defeating the privilege. There must also be a new trial of the complaint as to publication to Mrs. Watt, the occasion being held not to be privileged. The plaintiff must have the costs of this appeal; the costs of the first trial must abide the result of the second trial, the issues being separated.

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(1) [1917] A. C. 309, 330.

GREER L.J. The question involved in this appeal is one that, in my judgment, would be easy to answer if it were not for the difficulties occasioned by some of the earlier decisions on the subject of privileged occasions in the law of libel. Notwithstanding the serious difference of judicial opinion in the cases of *Coxhead* v. *Richards* (1); *Blackham* v. *Pugh* (2); and *Bennett* v. *Deacon* (3), the rule of law we have to apply in the present case has been finally accepted in the form stated by Lord Atkinson in *Adams* v. *Ward* (4): "A privileged occasion is . . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential." The language of Lord Atkinson is similar to that which was used by Lord Campbell in *Harrison* v. *Bush* (5): "A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty." This statement of the law is in accord with what was said by Parke B. in *Toogood* v. *Spyring* (6): "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." It is suggested, however, on the authority of Willes J.'s approval of the decision of Tindal C.J. and Erle J. in *Coxhead* v. *Richards* (1), in *Amann* v. *Damm* (7), and the similar approval of Blackburn J. in *Davies* v. *Snead* (8), and of the judgment of Lindley L.J. in *Stuart* v. *Bell* (9), that it is unnecessary that there should be any duty in the person making the communication, and that it is sufficient if there is either a duty on his part or an interest in the person receiving the communication. It is clear, however, that what was said by Willes J. in *Amann* v. *Damm* (7) was merely obiter, and that he was not

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(1) *Quaere* whether there is a publication of what a husband utters to his wife: *Wennhak* v. *Morgan* (1888) 20 Q. B. D. 635.

(2) The Times, March 21, 23, 24, 25, 26, 27, 30, 1896.

(1) 2 C. B. 569.
(2) (1846) 2 C. B. 611.
(3) 2 C. B. 628.
(4) [1917] A. C. 309, 334.
(5) 5 E. & B. 344, 348, 349.
(6) 1 C. M. & R. 181, 193.
(7) 8 C. B. (N. S.) 597, 602.
(8) L. R. 5 Q. B. 608.
(9) [1891] 2 Q. B. 341.

considering the question whether interest in the recipient was sufficient to establish a privileged occasion; and the observations relied on in the present case by Horridge J. in the judgment of Blackburn J. in *Davies* v. *Snead* (1) do not support the proposition for which they were cited. Blackburn J. is in effect treating the judgments of Tindal C.J. and Erle J. as based on the duty of the defendant to make the communication in question. He points out that the result of those two judgments, afterwards followed in *Blackham* v. *Pugh* (2), "is that where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bona fide and without malice does tell them it is a privileged communication." These words clearly indicate that the privileged occasion is based on a duty in the person making the communication to do what is right in the interests of society. It may be, of course, that the interest of the person receiving the communication is of such a character as by its very nature to create a social duty in another under the circumstances to make the communication that he does in fact make. In such a case the cause of the privileged occasion is not merely the interest of the recipient; it is that interest plus the corresponding social duty which arises in the circumstances of the case by reason of the nature of the interest. It is however unfortunate that Lindley L.J. in *Stuart* v. *Bell* (3) uses the words quoted by Horridge J., which appear to indicate that the occasion of privilege may arise either out of the moral or social duty of the person making the communication, or out of the interest of the person receiving it. It is quite clear, however, that the Lord Justice and the other members of the Court of Appeal did not decide the case on the ground that the existence of the recipient's interest was sufficient in itself to give rise to privilege. In his judgment Lindley L.J. cites with approval the following words from the judgment of Parke B. in *Toogood* v. *Spyring* (4): "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." These words seem to me to indicate that there must be the warrant of some social duty created by the "reasonable occasion or exigency." Assuming that the defendant has no common interest with the person to whom the libel is published, and it is necessary that there should be some moral or social duty to make the communication, what is the test by which duty is to be determined? This may be a question which it is very difficult to answer. Opinions may easily differ as to whether the circumstances are such as to make the communication a moral or social duty. Similar questions of degree arise in many cases, and are left to the determination of a jury. In negligence cases, what the reasonably careful man would do is left to be determined by a jury whenever it is a question in which opinions may differ. But it is well settled that whether an occasion be privileged or not is a question for the judge, though he may ask the jury to determine any particular facts that are in dispute. The only guide one can get from previous decisions is to be obtained from the judgments of the Court of Appeal in *Stuart* v. *Bell*. (1) There Lindley L.J. says: "I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal." Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication? Kay L.J. says (2): "The true mode of judging upon the question is to put oneself as much as possible in the position of the defendant." I think these tests are as near as one can reasonably get to the tests to be applied in forming an opinion on the question whether a privileged occasion arising out of a moral or social duty has or has not arisen.

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(1) L. R. 5 Q. B. 608.
(2) 2 C. B. 611.
(3) [1891] 2 Q. B. 341, 347.
(4) 1 C. M. & R. 181, 193.

In my judgment no right minded man in the position of the defendant, a friend of the plaintiff and of his wife, would have thought it right to communicate the horrible accusations contained in Mr. Browne's letter to the plaintiff's wife. The information came to Mr. Browne from a very doubtful source, and in my judgment no reasonably right-minded person could think it his duty, without obtaining some corroboration of the story, and without first communicating with the plaintiff, to pass on these outrageous charges of marital infidelity of a gross kind, and drunkenness and dishonesty, to the plaintiff's wife. As regards the publication to the plaintiff's wife, the occasion was not privileged, and it is unnecessary to consider whether there was evidence of express malice. As regards the publication to the chairman of the company, who owned nearly all the shares, and to Mr. Browne, I think on the facts as pleaded there was between the defendant and the recipients of the letters a common interest which would make the occasion privileged, but I also think there is intrinsic evidence in the letter to Browne, and evidence in the hasty and unjustifiable communication to the plaintiff's wife, which would be sufficient to entitle the plaintiff to ask for a verdict on these publications on the ground of express malice.

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(1) [1891] 2 Q. B. 341, 350.

(2) [1891] 2 Q. B. 359, 360.

The plaintiff's counsel put in as part of his case the defendant's answers to interrogatories 5 and 8, which were to the effect that the defendant believed all the matters alleged in Browne's letter, which he published to the plaintiff's wife and to Mr. Singer, to be true. It was suggested that this belief made it impossible to say that the publication was malicious. I do not agree with this view. Malice is a state of mind: see the judgments in the case of *Nevill* v. *Fine Arts and General Insurance Co., Ld.* (1) in the Court of Appeal. A man may believe in the truth of a defamatory statement, and yet when he publishes it be reckless whether his belief be well founded or not. His motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. He may be moved by hatred or dislike, or a desire to injure the subject of the libel, and may be using the occasion for that purpose, and if he is doing so the publication will be maliciously made, even though he may believe the defamatory statements to be true. I agree with the statement of the law contained in the late Mr. Blake Odgers' monumental book on libel and slander, which will be found at p. 354 of the 5th edition. It is as follows: "And even though it is clear that the defendant believed in the truth of the communication he made, and was acting under a sense of duty on a privileged occasion, the plaintiff may still rely upon the words employed, and the manner and mode of publication, as evidence of malice. An angry man may often be led away into exaggerated or unwarrantable expressions; or he may forget where and in whose presence he is speaking, or how and to whom his writing may be published. Clearly this is often but faint evidence of malice; the jury will generally pardon a slight excess of righteous zeal. In some cases, however (which we will proceed to examine) such excess has secured the plaintiff the verdict. But if the jury find there was no malice in the defendant, such excess becomes immaterial." (1)

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(1) [1895] 2 Q. B. 156.

I think the defendant's conduct in disseminating the gross charges that he did to the plaintiff's wife, and to Mr. Singer, and repeating and to some extent adding to them in his letter to Mr. Browne, and his offer to provide funds for procuring the evidence of the two women in Casa Blanca, affords some evidence of malice which ought to have been left to the jury. It is not for us to weigh the evidence. It will be for the jury to decide whether they are satisfied that in publishing the libels the defendant was in fact giving effect to his malicious or otherwise improper feelings towards the plaintiff, and was not merely using the occasion for the protection of the interests of himself and his two correspondents.

For these reasons I think the appeal should be allowed with costs, a new trial ordered, and the costs of the former trial should abide the event of the new trial.

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(1) 6th Ed. (1929), p. 291.

RUSSELL L.J. The plaintiff complains of publication by the defendant of defamatory matter on three occasions—namely, (1.) publication to the plaintiff's wife of the letter of April 30, 1928, from Browne to the defendant; (2.) publication to Singer of the same letter; and (3.) publication to Browne of the defendant's own letter of May 5, 1928. There is no plea of justification. The substantial defence as to each publication is that the letter was published without malice, and in the belief that the matters contained therein were true, and on a privileged occasion, and in such circumstances as to make it a privileged publication.

The plaintiff put in evidence the defendant's answers to the fifth and eighth interrogatories; the appeal accordingly falls to be decided upon the footing: (1.) that the defamatory matter contained in the letters is all false, and (2.) that the defendant believed it all to be true. Horridge J. decided that each publication was made on a privileged occasion, and that there was no evidence of malice to go to the jury. He accordingly withdrew the case from the jury, and entered judgment for the defendant.

The grounds of the decision as to privilege were as follows: As regards the publication to Singer he held that Singer, as director and largest shareholder of the Scottish Petroleum Company, and the defendant as director and liquidator of the company, had common interests in the communications regarding the conduct of the plaintiff while in the employ of the company. As regards the publication to Browne, he held that the defendant was entitled to apply to Browne for further particulars, and that he and Browne had a common interest in communications relating to the conduct of the plaintiff while in the employ of the company. He held, therefore, that the publication to Singer and the publication to Browne were made on privileged occasions.

As regards the publication to the plaintiff's wife, he felt more difficulty. As I understand the language used by the learned judge, the question which he considered and decided was this: Is it sufficient to constitute privilege that the recipient of the communication has an interest in receiving it, even if the person making the communication has no interest in making it, or duty to make it; or is it necessary to constitute privilege that reciprocity should exist, so that there should be both an interest or duty in the person making the communication to make it, and a duty or interest in the receiver to receive it? The former he regards as the view of Tindal C.J. and Erle J. in *Coxhead* v. *Richards* (1); the latter, as the view of Coltman and Cresswell JJ. in the same case. After referring to authorities, which he regards as supporting the former view, he concludes his judgment as to privilege thus: "I think the right view is that if there is an obvious interest in the person to whom a communication is made, which causes him to be a proper recipient of a statement, if that statement is honestly made, then the statement is privileged. Therefore I hold that on this occasion the statement to the wife, which consisted in producing the letter, was a statement made on a privileged occasion. Therefore I think all the communications—the communications to Mr. Singer, the communication to the wife, and the communication to Browne—were all made on privileged occasions." For myself, I am not prepared to assent to this view. In my opinion the true result of the authorities is as stated by Lord Atkinson in *Adam* v. *Ward* (2): "A privileged occasion is . . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

In view of the detailed examination of the authorities contained in the judgments of Scrutton and Greer L.JJ. I am content to express my view without further reasoning. That being my opinion, I now consider how the result of the authorities affects the decision in the present case.

As regards the publication to Singer, we must act upon the view, common to both sides of the pleadings, that at all material times the plaintiff, the defendant and Browne, were in the employ of the Scottish Petroleum Company. In these circumstances, and the defendant believing the truth of the libels, there was a duty on the defendant to make the communication to Singer, and an interest in Singer to receive it; hence was the occasion a privileged occasion. As regards the defendant's letter to Browne, this must also, I think, be held to have been written on a privileged occasion; the defendant having a duty to communicate to Singer had an interest in asking Browne for further information, and so an interest in making the communciation, which Browne had a duty to receive. Accordingly I agree with the learned judge, that as regards these two publications the occasions of them were privileged occasions.

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(1) 2 C. B. 569.

(2) [1917] A. C. 309, 334.

In regard to the question of evidence of malice, I have felt more difficulty in agreeing with the learned judge. I should have thought that the conduct of the defendant in making his hasty communication to the wife, and his subsequent conduct and the language used by him in his letter to Browne, was some evidence to go to the jury. No doubt the necessity of accepting the view that the defendant did in fact believe the truth of all the defamatory matters alleged, diminishes the weight of the other matters which might be relied upon by the jury as indicating express malice. The question should however in my opinion have been left to them to consider and determine.

As regards the communication to the plaintiff's wife, I am unable to say that, in the circumstances of the present case, there existed any duty on the defendant to communicate to the plaintiff's wife Browne's letter of April 30, 1928. The question whether any duty lies on a third party to communicate to one spouse the delinquencies of the other can never be answered by reference to a fixed test or rule. The answer in each case must always depend upon the actual facts of that case. After carefully considering the proved facts of the present case I agree with the other members of the Court that the publication made by the defendant to the plaintiff's wife of Browne's letter was not made upon a privileged occasion. The appeal should be allowed, and a new trial ordered.

Appeal allowed.
New trial ordered.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett.*
Solicitors for respondent: *Church, Rendell, Bird & Co.*

W. H. G.

NUGENT *v.* LONDONDERRY COLLIERIES, LIMITED.

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Workmen's Compensation—Dependants—Accident to infant Workman arising out of Employment—Family not then dependent on his earnings—Death after intervening Incapacity—Increased Compensation then payable—Increased Earnings that Workman would have been earning but for Incapacity—Right to have regard to them in determining Dependency—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 4, *sub-s.* 1.

Where an infant workman is injured by an accident arising out of and in the course of his employment and after remaining incapacitated for some time dies, the Court in ascertaining whether a member of the family within s. 4, sub-s. 3, of the Workmen's Compensation Act, 1925, was in fact a dependant of the deceased workman within s. 4, sub-s. 1, should have regard to the amount that the workman would probably have been earning at the time of his death but for the accident. The question of dependency has to be determined as at the date of the death and not of the accident.

The fact that at the date of the accident the earnings of the deceased workman were only sufficient for his own needs and left no surplus for the family does not preclude a member of the family from obtaining compensation as a dependant, if, in the opinion of the county court judge sitting as arbitrator under the Act, the workman would at the date of his death have been in receipt, but for the incapacity, of increased earnings that would have left a surplus for his family's support.

APPEAL from an award of the judge of the Seaham Harbour County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

Harold Nugent, the son of the applicant John Nugent, met with an accident arising out of his employment by Londonderry Collieries, Ld., on March 31, 1925. He was then earning 14*s.* 9*d.* a week as a driver and was 15¾ years old. He was totally incapacitated and was paid compensation at the rate of 14*s.* 5*d.* a week until June, 1927, when he became eighteen years of age. The amount of compensation was then reviewed under s. 11, sub-s. 2, of the Act by the Committee of Arbitration representative of the employers and their workmen, and increased to 19*s.* a week on the basis that but for his injury he would then be earning 26*s.* a week. He died on July 29, 1928, as the result of the injuries sustained in the accident. He was then nineteen years old.

At the time of the accident the family consisted of the applicant and his three children—Harold, Cecil and Alice. Neither of the younger children was then at work but the father was earning 3*l.* 13*s.* 2*d.* a week, making, with Harold's weekly earnings and 5*s.* (being the agreed value of free house and coal), a total weekly income of 4*l.* 12*s.* 11*d.* At the date of the death of the son, the father was earning 3*l.* 0*s.* 9*d.* a week and his son Cecil 18*s.* a week. The daughter remained out of work and kept the family home, so that the earnings of the family (including 5*s.* as before) were 4*l.* 3*s.* 9*d.* a week.

The father commenced proceedings claiming compensation as a partial dependant of his son. In the course of the hearing, the father admitted that at the date of the accident there was no profit to him and the family from the deceased son's wages, as the boy cost all he was bringing in at that time. At the date of his death an increase in the deceased's compensation was imminent. The county court judge said that if the deceased had been killed outright he should have found that he was not entitled to speculate on the future and to award compensation on the ground that there would or might have been a contribution by the deceased to the family purse in the future. But at the date of the deceased's death, he would but for the incapacity due to the accident have been earning wages that would have been of very material assistance to the family purse. The increased compensation of 19*s.* a week was in part a profit to the applicant. This distinguished the present case from *Young* v. *Londonderry Collieries, Ld.* (1), and the dictum of Scrutton L.J.

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(1) (1924) 17 B. W. C. C. 215, 220.

in that case. But it was contended that the employers could not be in a worse position in regard to the dependants because the deceased was not killed outright, and that the earnings to be looked at were the earnings at the time of the injury and not supposititious earnings at the time of the death. It was true that there had not been actual earnings at the death because of the injury sustained; but having regard to the passage in s. 4, sub-s. 1, of the Act "or would, but for the incapacity due to the accident, have been so dependent" it seemed to him that, if these supposititious earnings would in all probability have been actual earnings but for the injury and had been so found by award, those alternative words of the section fully covered the facts of this case.

It was clear on the facts that the father was partially dependent on the 19*s.* a week compensation and he would have been still more so on the wages upon which that compensation was based. The loss would have been still more substantial upon a reassessment of the compensation. He computed the proper compensation at 150*l.*, and would make an award in favour of the applicant for this amount.

The employers appealed.

W. Shakespeare and *C. B. Fenwick* for the appellants. The county court judge has found that the father was not a dependant of the deceased workman at the date of the accident. That being so, it is impossible to treat the father as a dependant as the result of what happened subsequently. While it is true that "dependants" are by s. 4, sub-s. 1, of the Workmen's Compensation Act, 1925, members of the workman's family dependent at the time of the workman's death, yet compensation can only be given in respect of the lost earning capacity, and the father was not dependent on the earnings at the date of the accident. The words in s. 4, sub-s. 1, "or would, but for the incapacity due to the accident, have been so dependent," do not affect this. Sect. 4 is merely directed to ascertaining the class of dependants of a workman, and in order that there shall be actual dependency

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there must have been dependency on the earnings at the date of the accident.

In *Young* v. *Londonderry Collieries, Ld.* (1), the death occurred at the time of the accident, and it was held that in determining the question of dependency regard could not be had to what might have been earned subsequently. In *Peart* v. *Bolckow, Vaughan & Co., Ld.* (2), it was held that when once dependency was established, account could be taken of prospective future earnings in assessing the compensation. Here, however, the claimant fails to prove that he is a dependant. For this purpose he has to show not only that he is within the class of dependants but also that he was actually dependent on the workman's earnings when the accident happened. This he has failed to do. The purpose of the Act is to compensate in respect of the termination of the earning capacity: see per Lord Robson in *New Monckton Collieries, Ld.* v. *Keeling* (3) and *Lee* v. *Munro.* (4) There is nothing in the Act which says that future dependency on future earnings constitutes dependency, however certainly a county court judge can forecast that in future there would have been dependency on future earnings. The sole purpose of the Act is to give compensation in respect of loss occasioned by interference with the earning capacity, and for a person to be a dependant he must have been dependent on the earning capacity which has ceased by reason of the accident. Although for the purpose of ascertaining the earning capacity at the date of the accident, the county court judge may look to the past or the future, yet in the present case there is no room for doing this, as the workman was in full work at the time of the accident and his earning capacity definitely fixed at 14*s.* 9*d.* a week.

J. Charlesworth for the respondent. The judge was entitled to award compensation. Under s. 4, sub-s. 1, the dependants are such persons of the workman's family as were dependent upon his earnings at the date of the death and not of the accident; and then to meet the case where earnings had

(1) 17 B. W. C. C. 215.
(2) [1925] 1 K. B. 399.
(3) [1911] A. C. 648, 663.
(4) (1928) 21 B. W. C. C. 401, 407.

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actually ceased at an earlier date in a case where the accident and death were not simultaneous, the sub-section proceeds "or would, but for the incapacity due to the accident, have been so dependent." These words stated more fully mean "or would but for the incapacity due to the accident have been dependent upon the earnings of the workman at the time of his death." This construction accords with the decision of this Court in *Brazewell* v. *Emmott & Wallshaw, Ld.* (1) There a widow who married a workman between the date of the accident and the death was given compensation as a dependant. It is contended that even where the accident and death were simultaneous, the county court judge could take into account future earning capacity. It is true that there is a dictum of Scrutton L.J. in *Young* v. *Londonderry Collieries* (2), to the contrary, and it is not necessary here to go so far as that. It is clear from *Dobbies* v. *Egypt & Levant Steamship Co.* (3), that dependency has to be determined at the date of the workman's death, and is a question of fact and not of legal relationship: *New Monckton Collieries, Ld.* v. *Keeling* (4); *Young* v. *Niddrie & Benhar Coal Co.* (5) And the county court judge is entitled to take into account in assessing compensation the facts that the deceased's wages might have been increased in the future: *Sheldon* v. *Butterley Co.* (6); *Dobbies*' case. (3)

[LORD HANWORTH M.R. Mr. Shakespeare admits that to be so wherever dependency has been established.]

The Court has held therefore that the county court judge can look to the future to ascertain the quantity of the compensation. It has never been decided that the workman must be dependent at the date of the accident as opposed to the date of death, and the words of s. 4, sub-s. 1, suggest the contrary. It is only reasonable in the case of an infant workman to determine dependency by reference to what he would have been earning at the date of his death but for the accident. Even if there was no profit to the family at

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(1) (1929) 140 L. T. 603.
(2) 17 B. W. C. C. 215.
(3) (1912) 6 B. W. C. C. 348.
(4) [1911] A. C. 648.
(5) (1913) 6 B. W. C. C. 774.
(6) [1919] 2 K. B. 600.

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the time of the accident from his earnings, the Court ought to be able to look and see what benefit would have accrued in the future.

Shakespeare replied.

Lord Hanworth M.R. This case has raised a very interesting point, and we are much indebted to counsel on both sides for the argument they have addressed to us. [His Lordship then stated the facts.]

The father makes the claim in the present case as a dependant partially dependent upon the earnings of his son Harold, who died on July 29, 1928. The county court judge, in a judgment which is both able and helpful, has told us the various considerations to which he has paid attention, and he has awarded a sum of 150*l.* as being the lump sum payable to the father as a dependant in respect of the loss suffered by reason of the death of his son Harold. From that award the employers have appealed.

Mr. Shakespeare takes the point that the time when the question of dependency falls to be determined is the time of the accident. If regard be had to that date, there is upon the facts found by the county court judge a decision that out of the 14*s.* 9*d.* brought home week by week by the workman, there was no balance or profit left as a contribution to the family earnings. In other words, the maintenance of his son Harold cost the father the full sum of 14*s.* 9*d.*, and it may be more. The county court judge has, however, taken the date at which the dependency is to be decided as the date of the death of Harold, that is July 29, 1928. At that time the weekly sum which would have been paid to Harold, if he had been earning wages, would have been 26*s.*, and the weekly sum which was actually being paid to him as compensation was 19*s.* The county court judge has decided that upon this figure there was a profit or contribution to the family earnings, that out of it the father would have a sum to maintain the standard of the family as a whole. His words are these: "I think I am entitled to treat his earnings for the purpose of this case as the earnings upon which the

Committee presumably based the compensation current at the time of his death and as there is a clear dependency shown upon them to take into consideration the probabilities of the future." I do not think it is possible for us to interfere with that decision of the county court judge. It has been said over and over again that the question of dependency is a question of fact. If any authority is required for that, I need only refer to the emphatic statements in the speeches in the House of Lords in *New Monckton Collieries, Ld.* v. *Keeling.* (1) If, therefore, the learned county court judge is right in holding that there was dependency at the time of the death, I do not think that we can intervene in any way on the question of figures.

As I said in *Brazewell* v. *Emmott & Wallshaw, Ld.* (2), it is useful to go back to the earlier sections of the Act. Compensation is payable to a workman who suffers an accident arising out of and in the course of the employment in accordance with the latter sections of the Act, and among the persons who are entitled to compensation are those who are totally or partially dependent upon him. The persons who are dependants are specified in s. 4, sub-s. 3, and include a father. Those dependants are entitled to recover compensation in respect of the loss that they have suffered by reason of one of the bread-winners to whom they look for sustenance being taken from them. Mr. Shakespeare says that the question of dependency has to be determined at the time of the accident, that is, the time when the earning capacity ceased. At first I was inclined to agree with his argument, but after careful consideration I have come to the conclusion that the time at which the class of dependants is to be decided is the date of the death. I have come to that conclusion from a close examination of the terms of s. 4, sub-s. 1. That section purports to state who are the dependants entitled to compensation. They must, of course, fulfil the test laid down in sub-s. 3, the test of kinship; but they must also fulfil the test which is laid down in s. 4, sub-s. 1. That sub-section is as follows : " The dependants of a workman entitled to claim

(1) [1911] A. C. 648.

(2) 140 L. T. 603, 605.

compensation under this Act, where the injury results in death, are such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death." I pause there for a moment to observe that the section clearly contemplates that there may be an accident or injury immediately fatal or there may be an accident which later terminates in death; but that after both the injury and resulting death have been referred to in the section, the time which is then referred to is the time of his death. It appears to me clear therefore that the persons made dependants by the section are those members of the workman's family who were dependent upon the earnings at the time of his death as contrasted with the date of the injury. Turning again to s. 4, sub-s. 1, there follows the phrase "or would, but for the incapacity due to the accident, have been so dependent." Now after the incapacity, there could not be earnings, but the Court must assume that earnings have continued, and ascertain who would be dependent upon the sums which would on this supposition be receivable by the workman. As Lawrence L.J. said in the *Brazewell* case (1), and to my mind rightly, the section deals with two classes of cases: first, the case where the workman had been killed outright by the accident, in which case he has been earning wages up to his death and it has only to be ascertained what members of his family were dependent on those earnings, and secondly, the case where the workman has sustained injury which incapacitates him for work but does not result in his death until a later period. In the latter case the section in effect provides that for the purpose of ascertaining which members of the family are dependent, it is to be assumed that the earning capacity of the workman continued, notwithstanding the accident, down to the time of his death, and that he remained in receipt of earnings down to that time. I find it impossible to say that the word "death" in the phrase "at the time of his death" is to be treated as only attributable to accidents immediately fatal. I think it is used as it was in the earlier part of the section, to refer to a death resulting from injury after an interval. When once the existence of dependency has been established Mr. Shakespeare admits that matters which belong to the future as well as to the past may be taken into account in assessing the amount of compensation. In *Lee* v. *Munro* (1) there were in fact at the death of the workman no dependants upon his earnings owing to misfortune which was temporary, but this did not prevent the wife from establishing a claim to compensation, because she was at all relevant times dependent upon her husband; even if at the time of his death he was not able to pay her anything, that did not prevent her still holding the position of a dependent. In *Peart* v. *Bolckow, Vaughan & Co., Ld.* (2), I took the view that the time to be considered in regard to the question of dependency was the time of the workman's death and not the time of the injury. I said (3): "We must look to see whether he was dependent on the earnings of the workman at the time of his death, that is the relevant time." In *Young* v. *Londonderry Collieries, Ld.* (4), Scrutton L.J. guarded himself, on a question which has not, I think, yet come up for decision. He said "if at the time of the death there is no dependency, because at the time of the death there is no balance coming or which has come in the past from the deceased to the alleged dependant, I personally am not at present satisfied that in a case like that you can say: 'Oh, but he is a dependant, because there would have been a contribution or might have been a contribution in the future.'" I think this question is still open. But the case of *Brazewell* v. *Emmott & Wallshaw, Ld.* (5), appears to me to have decided that the list of dependants is to be made up at the time of the death of the person and not at the time of the accident; and although it was perhaps unnecessary for that case to refer to it, I observe that in my note of the case Mr. Cave had in fact argued that in ascertaining who was a dependant the time to which the attention of the Court ought to be directed was the time of death, not the time

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(1) 140 L. T. 603, 607.

(1) 21 B. W. C. C. 401.

(2) [1925] 1 K. B. 399.

(3) [1925] 1 K. B. 406.

(4) 17 B. W. C. C. 215, 220.

(5) 140 L. T. 603.

of the accident. In terms that is not referred to in the case, but it was a part of the argument that was presented.

For these reasons, it appears to me that the learned county court judge has rightly directed himself. When once there is a dependency, which he has found, it is not doubted that he was entitled to take into account relevant matters of the past and of the future. Lastly, let me call attention to the fact that in *New Monckton Collieries, Ld.* v. *Keeling* (1) Lord Robson says in two places that the word "dependants" as defined by the Workmen's Compensation Act includes "all such members of the workman's family as were wholly or in part dependent on the earnings of the workman at the time of his death."

For these reasons it appears to me that the judgment of the county court judge is right and that the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. I need not repeat the facts of the case, which have already been fully stated by the Master of the Rolls and are not really in dispute. Mr. Shakespeare, in his able argument, contended that the county court judge was wrong in taking a hypothetical wage-earning capacity of the workman at the date of his death into account for the purposes of determining whether the members of his family were dependants entitled to compensation under the Act. He admitted that in view of the authorities (such as *Dobbies'* case (2); *Sheldon's* case (3); *Young's* case (4); and *Peart's* case (5) he could not successfully contend that, when once a total or partial dependency had been established, it was not legitimate to take the future earning capacity of the workman into consideration in determining the amount of compensation to be awarded; but he contended that this principle did not apply to a case like the present, where the workman had never earned more than enough to cover the cost of his keep, and where at the date of the accident the applicant and other members of the workman's family were not in fact dependent upon the workman's earnings. In support of that contention, Mr. Shakespeare made three main submissions: first, that there was no dependency in fact at the date of the accident, and that there is nothing in the Act which provides that a future dependency based on future earnings constitutes a dependency within the meaning of the Act, however accurately the county court judge may be able to forecast the future earning capacity of the workman; secondly, that the sole purpose of the Act was to give compensation for loss occasioned by interference with the earning capacity of the workman, and that in order to constitute a person a dependant entitled to compensation under the Act he or she must be a person dependent on the earning capacity of the workman which has been diminished or terminated by reason of the accident; and thirdly, that although for the purpose of ascertaining the earning capacity of the workman at the date of the accident both the past and future may in certain cases have to be taken into account, yet, in the present case, there is no room for taking either past or future events into account, as the workman was in full work at the time of the accident and his earning capacity at that time was definitely fixed at 14*s.* 9*d.* a week.

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(1) [1911] A. C. 648, 661.
(2) 6 B. W. C. C. 348.
(3) [1919] 2 K. B. 600.
(4) 17 B. W. C. C. 215.
(5) [1925] 1 K. B. 399.

The answer to the contention so put forward by Mr. Shakespeare seems to me to depend on the true meaning and effect of the expression "or would, but for the incapacity due to the accident, have been so dependent" in s. 4, sub-s. 1, of the Act of 1925. By virtue of s. 2 the compensation where death results from injury is to be payable to or for the benefit of the workman's dependants. Sect. 4 defines the dependants entitled to compensation, and s. 8 provides how the amount of the compensation to which the dependants are entitled is to be ascertained. In my opinion the crucial question in this case is whether the applicant and those on whose behalf he made the application were dependants within the meaning of s. 4, and that question is quite separate and distinct from the question which arises, if they are dependants, as to the amount of the compensation payable to them. It is clear that the dependants only become entitled to compensation under the Act on the death of the workman. If and so long as he survives the accident the compensation is payable to him, and his dependants have no claim to compensation. In every case the dependants entitled to compensation must be ascertained at the date of the death of the workman. Cases in which a workman meets with a fatal injury by an accident arising out of and in the course of his employment fall into two classes: first, where the workman is killed outright, and secondly, where he sustains an injury which, after a more or less protracted period, results in his death. In the former case it is open to doubt whether, where there is no dependency in fact, the county court judge can properly take the future earning capacity of the workman into account for the purpose of ascertaining who are his dependants. The cases to which I have referred show that where the workman is killed outright and the persons claiming compensation are in fact dependent on his earnings the judge ought to take the past and the future into account in calculating the amount of compensation. Those cases however do not decide whether where the workman is killed outright and the claimants were not then dependent on his earnings, the future earning capacity of the workman can be taken into account for the purpose of determining whether the claimants are dependants or not. In *Young's* case (1) Scrutton L.J. says: "I wish, however, to guard myself on one question, i.e., if at the time of the death there is no dependency, because at the time of the death there is no balance coming or which has come in the past from the deceased to the alleged dependant, I personally am not at present satisfied that in a case like that you can say: 'Oh, but he is a dependant, because there would have been a contribution or might have been a contribution in the future.' The county court judge has said he considered the probable increase in the amount of the deceased's contribution. I am not sure that he is entitled to do that when at the time of the death there is no net balance in favour of the dependant, no net balance that the dependant would receive. I do not finally decide that matter, but I should like to reserve it for future consideration. My present view is that it is not admissible." The learned county court judge in the present case has adopted the same view, and as at present advised, I respectfully agree with it, though I also desire to reserve my final opinion upon this point. In *Young's* case (1) the workman was killed outright, and the question which we have had to consider in the present case did not arise.

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(1) 17 B. W. C. C. 215, 220.

In the second class of cases which I have mentioned, it is plain that some assumption has to be made. As I pointed out in *Brazewell* v. *Emmott & Wallshaw, Ld.* (2), it has to be assumed that the earning capacity of the workman continued notwithstanding the accident and that he was in receipt of wages at the time of his death. This assumption however does not quite cover the present case. Mr. Shakespeare says: "Be it so, but the earning capacity which is to be assumed to have continued is that which existed at the date when the accident occurred, and in order to determine whether the persons were dependants at the date of the workman's death, you must take the wages which the workman was receiving at the date of the accident and treat them as the measure of his earning capacity at the date of his death, and if you do that here you find that the assumed amount of the wages as at the date of the death were not more than enough to cover the workman's keep." I think that this is a wrong view of the effect of s. 4. In my opinion the learned county court judge was right not only in making the assumption that the earning capacity continued down to the death, but also in measuring that earning capacity in the light of the facts which had supervened since the date of the accident.

Those facts are somewhat special in the present case. The workman was $15\frac{3}{4}$ years of age at the date of the accident. At the date of his death, some three years later, his earning capacity would, but for the accident, have increased owing to his increase in age. I see no valid reason why, since an

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(1) 17 B. W. C. C. 215.

(2) 140 L. T. 603.

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assumption has to be made that the earning capacity of the workman has continued notwithstanding the accident, any relevant events which have occurred between the accident and the death should not be taken into account in measuring the assumed earning capacity of the workman at the time of his death, not it is true for the purpose of ascertaining the amount of compensation payable (which has to be calculated in accordance with s. 8) but for the purpose of ascertaining whether the members of the workman's family would but for the incapacity due to the accident have been dependent upon his earnings within the meaning of s. 4, sub-s. 1.

For these reasons I think that the decision of the county court judge was right, and that this appeal fails.

SLESSER L.J. In this case a considerable period elapsed between the injury and the death, and therefore we have not here to consider the case which has often been considered in the Courts where the death and the accident are coincident in time. The problem which has arisen here is this. It is found, and not disputed, that at the time of the accident the father, who is here the applicant, was not dependent upon the wages of the son; he stated, and the county court judge has found, that at the time the son was only bringing in enough, perhaps not enough, to maintain himself. Subsequently, however, increasing compensation was awarded to the son, and the question which the learned county court judge had to decide, which has had to be considered in this Court, is whether at the time of the death, which was July 29, 1928, the father can or cannot be regarded as dependent upon the son.

Sect. 4 of the Act of 1925 defines the persons who are to be deemed to be dependants. It follows substantially the definition in s. 13 of the Act of 1906, and it is not concerned with the question of the amount of the compensation but only with defining the dependants. So far as relevant here, the definition contains two limbs: first, it defines as dependants such of the members of the workman's family as were dependent upon the earnings of the workman at the time of his death. So far sub-s. 1 of the section is dealing with the case where the accident synchronizes with the death. It goes on, "or would, but for the incapacity due to the accident, have been so dependent." As I understand it, Mr. Shakespeare's argument is that in considering whether there was dependency at the time of the death regard can only be had to the earnings at the time of the accident; and that, as at the time of the accident the earnings of the son did not suffice to make the father a dependant, you cannot conjecture whether those earnings would have increased by the time of the death and whether that increase would have resulted in a dependency. It is quite clear that had the accident and the death synchronized the probabilities of future earnings might have been considered. That was decided, if it needed decision, in *Lee* v. *Munro* (1), where Sankey L.J., as he then was, cites a number of cases, many of which have been mentioned by Lawrence L.J., and says: "In deciding whether or not there is dependency the factors to be considered are past events and future probabilities." The section provides that the dependant may be a person who, but for the incapacity due to the accident, would have been so dependent, the time contemplated clearly being the time of the death. I am of opinion that in considering whether the person would be so dependent but for the incapacity due to the accident, the county court judge is entitled to take into consideration the probabilities of an increase in the amount of money which by reason of the increased earnings of the workman would but for the accident have come to the person claiming to be dependent between the time of the accident and the time of the death; and I am fortified in that view in the present case by the fact that s. 11, sub-s. 2, of the Workmen's Compensation Act contains express provisions for review in the case of an injured infant workman, thereby contemplating that there would have been a natural increase in his wages.

But in my view the substance of this case has already been decided in *Brazewell* v. *Emmott & Wallshaw, Ld.* (2), to which

(1) 21 B. W. C. C. 401, 408.

(2) 140 L. T. 603.

my Lord has called attention. There are two elements that must be present to constitute dependency. The one is that the alleged dependant shall be a member of the workman's family: the other that there shall be actual monetary dependence. In *Brazewell's* case (1) the person claiming as a dependant of the deceased workman was not his wife at the time of his injury, but was at the time of his death; and all the learned judges in that case in passages which have been cited by my Lord took the view that the time of the death was the time to look at, and that as at that time the applicant had become the wife of the deceased she was entitled to recover. I think by parity of reasoning the other element of dependency must also be looked at as at the death. There is a passage in Greer L. J.'s judgment which is of value in this case. He says (2) in regard to s. 4, sub-s. 1: "It is not dealing with the position of an applicant *qua* applicant. It is dealing with the position of a member of the family, and somebody who is established to be a member of the family, and if that is the right question there could only be one answer to the question that the learned judge had to determine. She married him before his death. She was then within the definition contained in the Act a member of his family, and a dependant, provided that she could prove that as such member of his family she would have been dependent on his earnings at the date of his death; and there can be no doubt that as his wife, if he had been earning money instead of getting compensation at the date of his death, she would have been dependent upon those earnings." The learned county court judge has come to the conclusion here that if the deceased workman had been earning wages instead of receiving compensation at the date of his death, his father would have been dependent upon those earnings. There was in my view full justification for looking at what would have been the earnings at the time of the death. It is clear to my mind that the county court judge would have been wrong if he had restricted his consideration to the earnings at the time of the accident. He has to take into account the probabilities. The fact that increased

(1) 140 L. T. 603.
(2) 140 L. T. 608.

compensation had been awarded by the Committee appointed under the statute for the purpose of making such award afforded ample material for coming to the conclusion that at the time of the death had it not been for the accident the earnings would have been correspondingly increased.

For these reasons I am of opinion that this appeal should be dismissed. I will only add this in conclusion. Mr. Charlesworth has argued alternatively, as I understand him, that if the learned county court judge were not right on that point, yet he could, in considering the earning capacity at the date of the accident, have taken into account the subsequent probabilities. There is an observation of Scrutton L.J. to the contrary effect in *Young* v. *Londonderry Collieries* (1), who suggests that when at the time of the death there is no net balance in favour of the dependant, the county court judge should not consider the probable increase in the amount of the deceased's contribution. As my Lord has said, that point is still open, but had it been necessary to decide it I should, as at present advised, incline to the opinion that the view expressed by Scrutton L.J. was correct.

Solicitors: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne; Hyman Isaacs, Lewis & Mills, for Patrick Bennett, Newcastle-upon-Tyne.*

H. C. G.

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(1) 17 B. W. C. C. 215, 220.

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WOODROW *v.* TRAWLERS (WHITE SEA AND GRIMSBY) LIMITED.

Workmen's Compensation—Accident arising out of employment—Total Incapacity—Payment of Compensation—Subsequent discontinuance of Payment—Failure of Employers to comply with Act—Allegation of ending by Agreement—Workman's application for interim Award—Jurisdiction—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 12.

A county court judge sitting as arbitrator under the Workmen's Compensation Act, 1925, has jurisdiction under s. 12 of the Act to make an interim award in arbitration proceedings enforcing the obligation of an employer who has made weekly payments of compensation to an injured workman not to end or diminish the weekly payment in breach of s. 12.

Anchor Donaldson, Ld. v. *Crossland* [1929] A. C. 297 followed.

It is not a ground for refusing to make such an interim award in favour of the workman that an issue in the arbitration proceedings is whether the payment was ended by agreement. That issue can only be determined at the final hearing of the arbitration proceedings.

Appeal from an award of the Lowestoft County Court Judge, sitting as arbitrator under the Workmen's Compensation Act, 1925.

The facts which are fully stated in the judgment of the Master of the Rolls were briefly as follows:—

On January 6, 1929, Henry Bartholomew Woodrow, who was a deckhand on the steam trawler *Sea Lion*, was injured by pricking his thumb, which became septic. He received compensation from his employers at the rate of 30*s*. a week under the Workmen's Compensation Act, 1925, until May 17, 1929, when the employers stopped paying compensation in the following circumstances. On May 13, 1929, the workman, in response to enquiries by the employers as to his condition, wrote to them offering to allow their doctor to examine the thumb, and arrangements were made for him to see Dr. Halkyard on May 18. Meanwhile, on May 17, the workman forwarded a certificate by his doctor, Dr. Boswell, on the National Health Insurance form, to the effect that he was fit to resume work. On May 18, the workman was seen by Dr. Halkyard, who certified him to be fit for work. On the same day the employers wrote to him sending him a final payment of 1*l.* 5*s.* 9*d.*, part of a week's compensation being the amount due up to May 17.

On May 22, 1929, the workman's solicitors wrote to the employers, saying that they had before them the employers' letter of the 18th inst., "in which we observe you have stopped compensation upon a certificate given by Dr. D. W. Boswell, that our client is fit to resume work. There is apparently some mistake in this, as we ourselves have seen the hand and, in our opinion, he is not fit to return to work, but we are having him again examined by a medical practitioner and will communicate with you in due course." They go on to point out that the provisions of s. 12 of the Workmen's Compensation Act, 1925 (1), had not been complied with. The employers replied saying they had stopped compensation "because the man sent in his own doctor's certificate certifying him as fit for work as and from the 18th inst . . . . Further a report by Dr. Halkyard, who examined the man on our behalf, states he is fit for work." And they went on to say the work as a deckhand was available for him. On May 24, the solicitors wrote again saying "We cannot do better than forward you a copy of the medical report we have received from Dr. Boswell, from which you will observe that the man's hand is permanently disabled, but that he is fit for light work. Dr. Boswell assures us that the man will not be fit to carry out his duties as a fisherman again. The only reason we can explain why Dr. Boswell gave a certificate that the man was fit for work, is that under the National

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(1) "12. An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases :—

(1.) Where a workman in receipt of a weekly payment in respect of total incapacity has actually returned to work ;

(2.) Where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased ;

(3.) Where the medical practitioner who has examined the workman under section eighteen of this Act has certified that the workman has wholly or partially recovered . . . . and a copy of the certificate . . . . together with notice of the intention of the employer at the expiration of ten clear days . . . . to end the weekly payment . . . . has been served by the employer upon the workman : . . . ."

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Health Insurance immediately a man is fit for light work, that is the only certificate they can give."

As the employers still refused to pay compensation, the workman filed an application for arbitration on June 6, 1929. On June 10, 1929, he gave notice of an interim application "for an order in the nature of an injunction to restrain" the employers from discontinuing payment of compensation at the weekly rate of 1*l.* 10*s.* in respect of the accident.

The application came before the county court judge on June 14, when Dr. Boswell gave evidence that there was no change in the man's condition between May 17 and May 23, and the workman gave evidence that he could not carry on the work of a deckhand on a trawler.

The county court judge held that he could not grant an injunction, but allowed the application to be treated as one for an interim award which in a previous case before him he had held on the authority of *Anchor Donaldson, Ld.* v. *Crossland* (1) that he could grant in a case where compensation had been stopped in breach of s. 12.

He found that the workman was not then, and never had been, able to resume work as a deckhand, and held that on this interim application he could not determine the exact amount of his earning power and must continue the payment of the weekly compensation stopped on May 17 until the arbitration was heard. He, therefore, gave an award continuing the payment of 30*s.* a week until July 12 or the date of the hearing of the arbitration proceedings.

The employers appealed.

S. Cope Morgan for the appellants. There was a proper cessation of the payment of compensation because by May 18 the effect of the correspondence which had passed between the parties was that there was a concluded agreement. If so, the cessation of payment was justified and was not contrary to s. 12 of the Workmen's Compensation Act, 1925, and there could be no subsequent right to an interim award.

(1) [1929] A. C. 297.

But in any case no interim award ought to have been made. The county court judge had no jurisdiction to make such an award. He made it in reliance on *Anchor Donaldson, Ld.* v. *Crossland* (1), but that was a case to which the law of Scotland applied, and Lord Phillimore made it clear (2) that the power of an arbitrator to make an interim award existed under the law of Scotland and not of England. Lord Buckmaster also points out that there had been an habitual practice in Scotland since 1923. It is true that he goes on to say that the jurisdiction is inherent in the Act, but it was not necessary in that case to decide this. Rule 82 of the Workmen's Compensation Rules, 1926, was intended for use in such a case as the present, and the right course of the workman was to apply for leave to issue execution. In the *Anchor Donaldson* case (1) Lord Phillimore suggested that the proper course was for the workman to apply to record an agreement under rr. 11 and 12 of the Act of Sederunt to which in this country rr. 43 to 49 of the Workmen's Compensation Act, 1926, correspond.

In the *Anchor Donaldson* case (3) Lord Dunedin refers to the difficulty to the employers of recovering money paid to the workman, if it should turn out in the result not to have been due to him, and refers to *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.* (4) and *Chandler* v. *Webster* (5) in this connection. Notwithstanding the *Anchor Donaldson* case (1), it is contended that in England the arbitrator has no power to make an interim award. But in any case, the circumstances here are different, for the employers claim not to have acted contrary to s. 12. Therefore, even if the *Anchor Donaldson* case (1) be treated as deciding that there is in England power in the county court judge sitting as arbitrator to make an interim award, this is not a case in which he ought to have done so. It is only when the employer is definitely in default under s. 12 that an interim award can be made, and here the employers are claiming

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(1) [1929] A. C. 297.
(2) Ibid. 309.
(3) [1929] A. C. 297, 316.
(4) [1924] A. C. 226.
(5) [1904] 1 K. B. 493.

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to bring themselves within s. 12 as having terminated the weekly payments by agreement.

[LORD HANWORTH M.R. That is not a point which we can determine on this interlocutory application.]

But until it is determined, it cannot be said that the employers are in default. If it be said that that jurisdiction to make an interim award is inherent in s. 12 then before an interim award can be made, it must be shown that the employers have committed a breach of the section.

Further, the workman was admittedly able to do light work and in these circumstances the county court judge ought not to have awarded compensation at the full rate.

Collingwood for the respondent was not called upon.

LORD HANWORTH M.R. This appeal raises an important point and we have had the advantage of an informing argument from Mr. Cope Morgan for the appellants, but it appears to me that he had a difficult task in view of the decision of the House of Lords in *Anchor Donaldson, Ld.* v. *Crossland.* (1) On January 6, 1929, the workman who was employed as a deckhand on the appellant's trawler *Sea Lion* pricked his thumb which became septic and totally incapacitated him. He was paid full compensation on the basis of total incapacity up to May 11, 1929, and during that period his doctor certified each week that the man was still incapacitated. On May 17, the doctor issued a further National Health certificate that the man was incapacitated for work down to that date owing to the injury to the thumb but that he would be fit for work the next day. Meantime, other steps had been taken. A letter was sent on May 13, 1929, by the workman, in which he said: "I am very sorry that I have been unable to give you any definite answer from the doctor about the thumb. One doctor said he did not think the thumb would be any more good to me, but carry on for a time. I am writing for you to have your own doctor to examine the thumb. This would be more satisfactory on both sides. I cannot carry on my work as the thumb is now." On May 15, the employers wrote in reply that they had written that day to Dr. Halkyard of London Road, Lowestoft, asking him to appoint a day and time for the applicant to call at his surgery so that he might examine the thumb on the employers' behalf. That was the first step taken by the employers to ascertain whether the time had come for a review of the weekly payments. On May 17 the workman wrote to the employers enclosing his own doctor's certificate, and he stated: "I have been notified by Dr. Halkyard to attend his surgery Saturday (May 18), and he will let you know about my thumb." Thus, at the very time when the certificate of May 17 had been given by the workman's own doctor he was writing to his employers that he would attend on May 18, before a doctor appointed by them. Therefore, the result of the letters I have read is that by May 18 it was known by Woodrow that he was to be examined by the employers' doctor and that his own doctor had given a certificate that he would be fit for work on that day and that he had himself said it would be more satisfactory to be examined by the employers' doctor.

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(1) [1929] A. C. 297.

On May 18, he was examined by the doctor for the employers and the terms of his certificate were: "The above man has a deep scar on the right thumb the result of a septic affection following his accident. The wound is now soundly healed. There is some limitation of movement in the last joint of the thumb. This is probably due to destruction of the flexor tendon by the septic process and is likely to be permanent. There is also considerable wasting of the thumb muscles, which I attribute to disuse of the hand; and some weakening of the grip of the hand due to the same cause. The grip of the hand and the wasting of the muscles is likely to improve when the hand is used. In my opinion, he is now fit to resume his work though his efficiency is likely to be less for some time than it was before the accident." On the same day the employers wrote to Woodrow acknowledging receipt of the letter of May 17, enclosing medical certificate for which they stated they observe that his doctor certified him as fit for work as on the 17th inst. They then stated that they enclosed compensation down to the 17th amounting to 1*l.* 5*s.* 9*d.*, for which they asked him to sign the enclosed receipt. The receipt was sent and was as follows: "Received the sum of one pound five shillings and nine pence, six days' compensation to 17/5/29. H. B. Woodrow."

It is claimed that on those facts, including the certificate of the workman's own doctor and the certificate of the employers' doctor, that the man was clearly able to go back to work, and that, as 1*l.* 5*s.* 9*d.*, being six days' compensation, and not 30*s.* was sent to him for the week ending May 17, and accepted by him, there is evidence that an agreement was entered into at that date, that the workman was no longer incapacitated but was fit to return to work. I express no opinion whether these facts amount to an agreement. That is a matter for the county court judge to decide. But it is to be observed that upon obtaining the certificate given on May 18 by their doctor, the employers did not take the course of serving a notice under s. 12, sub-s. 3, of the Workmen's Compensation Act, 1925.

On May 22, a claim was made by the workman's solicitors on being consulted by him. The letter they sent to the employers was: "We have been consulted by Mr. H. B. Woodrow of 58 Clemence Street, Lowestoft, with reference to the accident he received on January last whilst working on the steam trawler *Sea Lion*. We have before us your letter of the 18th instant in which we observe you have stopped his compensation upon a certificate given by Dr. D. W. Boswell that our client was fit to resume work. There is apparently some mistake in this, as we ourselves have seen the hand and, in our opinion, he is not fit to return to work, but we are having him again examined by a medical practitioner and will communicate with you in due course. We should like to refer you to section 12 of the Workmen's Compensation Act which states that before compensation can be stopped employers must serve a proper medical certificate giving the reasons for such stoppage upon the workman and this you have not complied with."

On May 23, the man was examined by Dr. Boswell, his own doctor, who reported that Woodrow was fit to do light work of a suitable nature but that he was not fit to do his ordinary work for which it was necessary for him to have strong useful hands. On the same day the employers wrote: "We have your letter of the 22nd inst. in this connection and note all you write. We ceased compensation because the man sent us his own doctor's certificate certifying him as fit for work on and from the 18th inst. and which certificate is now in our possession. Further, a report by Dr. Halkyard, who examined the man on our behalf, states he is fit for work. If the man presents himself to our ship's husband, his old position as deck hand is open and he can obtain this work immediately; it rests entirely with him to come over and present himself to us when work will be found him."

In reply the workman's solicitors wrote: "We cannot do better than forward you a copy of the medical report we have received from Dr. Boswell, from which you will observe that the man's hand is permanently disabled, but that he is fit for light work. Dr. Boswell assures us that the man will not be fit to carry out his duties as a fisherman again. The only reason we can explain why Dr. Boswell gave a certificate that the man was fit for work, is that under the National Health Insurance immediately a man is fit for light work, that is the only certificate they can give."

In consequence of these letters and certificates a dispute arose and on June 6, 1929, the workman filed a request for arbitration asking for 1*l.* 10*s.* a week from May 18, and the balance of 4*s.* 3*d.* due on May 18. To that the employers filed an answer, saying that the incapacity for work was not total and that the incapacity ceased on or before May 17, 1929, from which time the man was able to earn his ordinary rate of wages as a deckhand.

These were the issues. I pause to notice that the exceptions which under s. 12 would have justified the employers in ending or diminishing the weekly payments did not apply. These exceptions are three in number—namely, first,

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that an agreement had been entered into to end or diminish the weekly payments, or an arbitration had so decided; secondly, that the workman had returned to work, and, thirdly, that a certificate of a doctor had been obtained that the workman had wholly or partially recovered and a copy of the certificate been served with a notice to determine the payments at the end of ten days under sub-s. 3 of s. 12.

The result was that the obligation imposed by s. 12 remained, and the employers were not entitled to end or diminish the weekly payments.

On June 10, an application was made by the workman for an injunction to restrain the employers from discontinuing the payment of compensation at the weekly rate of 30*s*. In no circumstances could there properly be an application for an injunction. The county court judge has no power to grant an injunction in such a case when he is sitting as arbitrator under the Workmen's Compensation Act. The county court judge, however, made the following interim award: "I find that the applicant Woodrow is not now and never has been able to resume his ordinary work as a deckhand, but I hold that on this interim application I cannot determine the exact amount of his earning power and must continue the payment of the weekly compensation improperly stopped on May 17, until the arbitration is heard, when the proper amount of compensation due from May 17 can be fixed. I therefore grant an interim award to continue the payment of the 30*s*. a week until July 12 or the trial of the arbitration."

The county court judge therefore held that there had been a partial recovery of the workman and that he was fit for some work, but that the steps open to the employers under s. 12 for ending or diminishing the compensation under s. 12 had not been taken. The appeal is from that interim award.

The county court judge felt the difficulty of dealing with the application as one for an injunction, and in the course of the argument, after referring to his judgment in a previous case when he had said that the Court would grant an injunction to prevent a breach of s. 12, he said: "On reading

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the case through (*Anchor Donaldson, Ld.* v. *Crossland* (1)) more carefully, it seems to me that I ought to have said that the English Court will grant an interim award. Therefore I shall give Mr. Bracey leave to amend this application from an injunction to an interim award." It was argued before him that there was no power to make an interim award, especially in a case when the workman was obviously not totally incapacitated, and that to make an award for full compensation up to the date of the hearing of the arbitration was to ignore the plain facts of the case. The county court judge said: "I shall find what the evidence is before me by the doctor and the man. I shall find that on that evidence I think the man could earn something. I shall not go into the question of how much because I do not think I have the jurisdiction."

We have to determine whether there is power to grant an interim award. We are told there is such a power in Scotland, but that Lord Phillimore in *Anchor Donaldson, Ld.* v. *Crossland* (2) doubted whether there was power for an English arbitrator to grant such an award. It is, however, quite plain that the majority of the House of Lords in that case took the view that there was jurisdiction for an English arbitrator to make such an award and, if so, we ought not to interfere with this interim award. The reason why I say that it was plainly the view of the majority is this. Lord Buckmaster said (3): "I do not entertain much doubt as to the meaning of s. 12. Its purpose is, to my mind, plain. It is to secure that if weekly payments are, in fact, being made to a workman, they shall not be ended apart from agreement or arbitration except in the cases that are specified. None of the occurrences mentioned in the three sub-heads is alleged in the present case, and it therefore follows that the obligation imposed by the first words of the section still remains." Then, after pointing out that this conclusion was not affected by the decision in *Ocean Coal Co.* v. *Davies* (4) and *Niddrie and Benhar Coal Co.* v. *Dee* (5), he said (6): "How is this right to be enforced? Lord Carson in the *Ocean* case (1) appeared to think that independent common law proceedings might be used." Then a little further on he says (2): "This right to the continuance of the weekly payments is associated with that claim for compensation, and by the Act is to be continued until the legal rights of the parties are determined, or the payments ended by the statutory means." On the question how an order is to be obtained continuing the payments Lord Buckmaster is also explicit (3): "Where arbitration proceedings are pending, the enforcement of the workman's right under s. 12 must necessarily be ad interim, pending the award, and if independent proceedings were taken to enforce the right, such proceedings here would in the ordinary case be before the county court judge and (I apprehend) in Scotland before the Sheriff-Substitute—in other words, before the very arbitrator who has charge of the dispute. It seems to me impossible that in such circumstances the jurisdiction could only be invoked by outside process and not by application in the arbitration itself. . . . . I do not think that this is a peculiarity of Scotch procedure. I think it is inherent in the Act, and to decide otherwise would mean that, in a statute based upon the principle that arbitration and not the usual proceedings in the Courts should be the means of settling disputes, an interim matter in the arbitration is to be settled by those very Courts, the authority of which has been excluded. I think, therefore, the arbitrator was right in making the interim award, but I do not think he had any power to order payment into Court." With this view Lord Dunedin expressly agrees.

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(1) [1929] A. C. 297.
(2) Ibid. 310.
(3) Ibid. 302.
(4) [1927] A. C. 271.
(5) [1927] A. C. 299.
(6) [1929] A. C. 304.

The effect of the decision and speeches in *Anchor Donaldson, Ld.* v. *Crossland* (4) is to make it clear that there is implied by s. 12 a duty to continue the weekly payments unless there is an agreement or the procedure there set out is complied with and that the arbitrator has power to make an interim award to enforce the right given to the workman by s. 12. Therefore, there was power for the county court

(1) [1927] A. C. 271, 297.
(2) [1929] A. C. 305.
(3) [1929] A. C. 305.
(4) [1929] A. C. 297.

judge to make this order. Unfortunately, there is no power, as Lord Buckmaster points out, to order payment into Court except in the limited case mentioned in proviso (ii.) to s. 12, with the result that the employers may have to continue payments which the workman may ultimately be held not to have been entitled to receive.

I am anxious to guard myself from saying that there is any power to make an interim award except under s. 12. The power of the arbitrator is given by s. 21, and it is a power to settle outstanding questions between the parties. There is a limited power to make rules of Court conferred by Sch. I., para. 6. It has been pointed out in a number of cases that when a county court judge is hearing an application under the Workmen's Compensation Act, he is sitting as an arbitrator only. That was determined in a number of cases in the Court of Appeal set out in Willis's Workmen's Compensation, 25th ed., p. 406. In *Turner* v. *Kingsbury Collieries, Ld.* (1), where McCardie J. collected all the authorities, he decided that prohibition would not lie to an arbitrator. He is not a Court within ss. 127 and 186 of the County Courts Act, 1888, and in *Taylor* v. *Cripps* (2), a case decided before the County Courts Act, 1919, it was held that the duty of taking evidence in such arbitrations could not be delegated. Cozens-Hardy M.R. said: "This is an arbitration not an action," and Swinfen Eady L.J. said the same. The power to make rules under the Workmen's Compensation Act, 1906, was given by s. 25 of the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), and was confined to making rules conferring power to make orders for the examination of witnesses, discovery, interrogations and granting a new trial. Having regard therefore to the limited power to make rules and the circumscribed jurisdiction of the county court judge when sitting as arbitrator, he would not have power to make an interim award except under s. 12. Until the Common Law Procedure Act, 1854, was enacted there was no power in the case of an arbitration to ask for an advisory case to be heard by the Courts. That matter is now dealt with by s. 19 of the Arbitration Act, 1889, and

(1) [1921] 3 K. B. 169, 176.

(2) [1914] 3 K. B. 989.

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there is a clear rule that an award must be final and certain. Therefore, an interim award would not be possible but for s. 12 of the Workmen's Compensation Act, 1925, which was intended to give something more to the workman than he had before, namely, the power to enforce payment even though the ultimate dispute had not been decided. The effect is that an interim award can be made to give effect to the right of the workman to be paid unless the employers follow the particular procedure laid down in s. 12.

I may add that, as the matter is of considerable importance, it might be useful for a special form of interim award to be provided in the forms scheduled to the Act, and possibly rules might be made as to obtaining interim award. The appeal must be dismissed.

LAWRENCE L.J. On January 6, 1929, the workman, a deckhand on a trawler, sustained an injury by accident arising out of, and in, the course of his employment. The employers admitted liability and paid him compensation on the footing of total incapacity, but there was no award or recorded agreement. On May 17 the employers stopped payment without serving any notice under s. 12, sub-s. 3, although the workman had not actually returned to work. On June 6 the workman made an application for arbitration claiming an award of compensation on the ground that he was still incapacitated. The employers alleged that they had stopped the weekly payments because the workman had then fully recovered and moreover had agreed to end the payment. Alternately, they alleged that the workman had partially recovered and was able to earn the current rate of wages of a deckhand. On June 14 the learned county court judge, on an application made by the workman in the arbitration proceedings, made an interim award whereby the employers were ordered to pay to the workman 30*s*. a week as from May 17, until the hearing of the arbitration. The judge stated that the award was made without prejudice to any question of liability as to compensation. The present appeal is brought from this interim award, and the questions raised before us are, first, whether the judge had jurisdiction to make an interim award at all, and, secondly, if he had any such jurisdiction, whether it was rightly exercised in the circumstances of this case.

In my judgment the first question thus raised is covered by the decision of the House of Lords in *Anchor Donaldson, Ld.* v. *Crossland*. (1) The appellants sought to distinguish that case from the present on two grounds, namely, first, because the decision was founded on Scotch procedure, which differed from English, procedure, and, secondly, because the employers in that case had not alleged that they had come to an agreement with the workman to end the weekly payments.

As to the first of these grounds, it is clear that the majority of the Law Lords based their decision on the true meaning and effect of s. 12 and not on Scotch procedure. Lord Buckmaster, after stating that when arbitration proceedings are pending the enforcement of the workman's right under s. 12 must necessarily be ad interim the award, and that the jurisdiction to make an interim award may be invoked by an application in the arbitration itself, and after referring to the practice to this effect which had prevailed in Scotland since 1923, says (2): "I do not think that this is a peculiarity of Scotch procedure. I think it is inherent in the Act. . . . ." Lord Dunedin, after stating that at common law a Scotch arbitrator has inherent power to make interim awards, but that the decisions of the Court of Sessions under the Workmen's Compensation Act were not put upon the common law, but rather on the obvious meaning of s. 14 of the 1923 Act or its equivalent s. 12 of the 1925 Act, agreed with the view expressed by Lord Buckmaster in the passage which I have cited. (3) Lord Phillimore, on the other hand, whilst agreeing with the ultimate conclusion arrived at by Lord Buckmaster and Lord Dunedin, rests his judgment on the Scotch procedure and states that in his opinion there is no express power given to the arbitrator to make an interim award and that he is not aware that an English arbitrator has any such power. In making the latter statement Lord

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(1) [1929] A. C. 297.

(2) [1929] A. C. 305.

(3) [1929] A. C. 315.

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Phillimore no doubt had in mind the principle established in England, that as a general rule the award of an arbitrator must be final, and that unless the submission expressly empowers the arbitrator to make interlocutory awards regulating the intermediate enjoyment he has no power to make an interim award: see e.g. per Parke B. in *Wrightson* v. *Bywater.* (1) This Court, however, is bound by the opinions expressed by the majority of the Law Lords in the *Anchor Donaldson* case (2), which opinions (though this is immaterial) commend themselves to my mind. The first ground of distinction taken by the appellant therefore fails.

The second ground, however, raises a more difficult point, namely, can an arbitratior make an interim award under s. 12 when in the pending arbitration proceedings the employers allege not only that the incapacity of the workman has ceased, but also that they have made an agreement with the workman to end the weekly payments, and when there is a bona fide dispute, to be determined at the hearing of the arbitration, whether any such agreement was in fact made ?

In the present case the employers in stopping payment did not purport to act pursuant to any recorded or defined agreement providing for the termination of the weekly payments, but they rely upon certain documents and facts from which they contend an agreement between themselves and the workman to end the payments ought to be implied. It is apparent therefore that if in such a case as this the arbitrator has no power to make an interim award without first going into the facts and finally deciding one of the main questions arising in the arbitration proceedings (which question in the present case is very much mixed up with the other question in the arbitration), the power of the workman to enforce the right, conferred on him by s. 12, to a continuance of the weekly payments pending the making of an award determining the legal rights of the parties would be seriously restricted and to a considerable extent rendered nugatory, as it would not be practicable for the county court judge in the hearing of such an application to investigate and finally determine one of the main questions in dispute. It is true that in *Anchor Donaldson, Ld.* v. *Crossland* (1) there was no allegation that the workman had agreed to end the weekly payments, and, therefore, that case does not expressly decide the point which arises here, but it does decide that the arbitrator can make an interim award without first determining whether the incapacity of the workman still continues, although according to the decision in *Ocean Coal Co.* v. *Davies* (2) the continuation of the incapacity is a condition precedent to the workman's right under the Act to receive any compensation at all. When dealing in *Anchor Donaldson, Ld.* v. *Crossland* (1) with the question whether the workman's rights under s. 12 of the Act ought to be enforced by common law proceedings or by recording an agreement and charging upon it or whether it ought to be enforced by an application in the arbitration proceedings for an interim award, Lord Buckmaster made some observations which, in my opinion, are useful on the question which has arisen in the present case. He states (3) that the right of awarding compensation is vested in the arbitrator, and that this gives him seisin of the dispute in relation to the payment of compensation, and that the right to the continuance of the weekly payments is associated with that claim for compensation and by the Act is to continue until the legal rights of the parties are determined. Applying these observations to the present case, we have here an arbitration pending in which there is a dispute whether the workman is still totally or partially incapacitated and whether he has or has not agreed to end the weekly payments. The county court judge has seisin of that dispute, and the scheme of s. 12 is that the weekly payments should continue until the legal rights of the parties are determined. In principle I see no difference between the power to make an interim award in a case where the dispute in the pending arbitration proceedings is whether the workman has fully recovered and the power to make such an award in a case where the dispute is whether the workman

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(1) (1838) 3 M. & W. 199, 207.

(2) [1929] A. C. 297.

(1) [1929] A. C. 297.

(2) [1927] A. C. 271.

(3) [1929] A. C. 305.

has agreed to end the weekly payments. In either case the result of the arbitration may be that the employers were justified in ending the weekly payments and that the workman will, under the interim award, have received weekly payments although not entitled under the Act to compensation for loss of earning capacity. On the whole, I have come to the conclusion that the learned county court judge had jurisdiction in the present case to make the interim award.

There only remains the question whether it was right to make the employers pay the full sum of 30*s.* a week in view of the evidence adduced by the employers, which they contended plainly showed that the workman was no longer totally incapacitated. In my opinion the county court judge has rightly exercised his jurisdiction in this respect. Sect. 12 enacts that the employers shall not be entitled otherwise than pursuant to an agreement or award to end or diminish a weekly payment except in certain cases, which admittedly have not occurred here. Therefore, until it is determined by an award in the pending arbitration proceedings that the employers were justified in ending the weekly payments, it was right to order them to continue such payments undiminished.

In the result for the reasons stated I think that the learned county court judge was right and that this appeal fails. I agree, too, with the Master of the Rolls in his remarks as to the advisability of framing rules dealing with interim awards.

SLESSER L.J. I agree. I do not propose to recapitulate the facts which have led up to this litigation. Suffice it to say that after June 6, when the original application for arbitration had been filed, on June 10, 1929, it was sought, on behalf of the applicant, to claim an injunction to restrain the respondents from discontinuing payment of the compensation. This application was obviously misconceived. It is impossible, in my opinion, for an arbitrator under the Workmen's Compensation Act in any circumstances to grant an injunction, and even if reliance were placed on the power of the county court judge as such to grant an injunction, it has been decided in *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers* (1) and other authorities that a county court judge can only grant an injunction as an ancillary remedy in cases where damages are sought. Therefore the remedy of injunction from every point of view was wholly inappropriate to achieve the remedy desired.

On the other hand, it has been decided in the case of *Anchor Donaldson, Ld.* v. *Crossland* (2) that an interim award may be made in an appropriate case by an arbitrator, and during the course of the present proceedings the application was changed to one for an interim award, and an interim award was made by the learned county court judge for compensation to be paid from May 17, 1929, and to be continued up to the hearing of the arbitration. The appeal here has been argued on the assumption that the whole proceedings were for an interim award.

It is said for the appellant that in making the interim award the learned county court judge erred in two respects: first, that he had no jurisdiction, and secondly, that even if he had, he should not have exercised it in the circumstances of this case. In my opinion the question of jurisdiction is now set finally at rest by *Anchor Donaldson, Ld.* v. *Crossland* (2), where it was held by the majority of the House of Lords that the practice of granting interim awards, which has apparently obtained in Scotland for some time, either under the common law of Scotland or under the Workmen's Compensation Acts since 1923, can properly and appropriately be employed in England. That is clearly the view of both Lord Buckmaster and Lord Dunedin, and although Lord Phillimore appears to differ, that is the view of the majority of the House of Lords. Both those learned Law Lords in their speeches base their view that an interim award may be granted, not upon any common law right or any pre-existing statutory right in the arbitrators to make such an award, but solely upon the provisions of s. 12 of the Workmen's Compensation Act, 1925. I need not refer again to the passages which have been quoted by

(1) [1921] 2 K. B. 694.

(2) [1929] A. C. 297.

the Master of the Rolls, which make that clear, but, in my opinion, nothing was said by either of these learned Law Lords to disturb the general law as to the power of arbitrators. Lord Buckmaster says that the power is inherent in s. 12 itself; and indeed when once it has been decided, as it was in that case beyond all question, that there is a right in the workman to require the employer not to end or diminish the weekly payments except in the cases specifically mentioned in s. 12 then, unless the power to make an interim award was within the jurisdiction of the county court judge, it is difficult to see how the restriction on the right of ending or diminishing an award could be enforced. Various methods have been attempted for enforcing the provisions of s. 12: the method of injunction, the method of obtaining a declaration in an independent action which was tried in *Catton* v. *Ashwell and Nesbit, Ld.* (1) Other methods have been attempted or suggested, but have apparently failed in their object. There is no doubt now in my mind, first, that the learned county court judge has power to make an interim award, and secondly, that it should be obtained by an interlocutory application in the Workmen's Compensation proceedings themselves, and not by an independent action.

If that be so, then the matter is concluded, subject to Mr. Morgan's second contention, that even if the learned county court judge had jurisdiction to make an interim award, he ought not, in this case, to have exercised it. Mr. Morgan's second point depends upon the provision in s. 12, that an employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end a weekly payment; and he contends here that the ending was done in pursuance of an agreement and accordingly, that there was no power here for the workman to require the employer not to end the payment. It has already been held, as has been pointed out by Lawrence L.J., that where the question whether the incapacity has ceased is at issue, that does not diminish the obligation of the employer de facto (to use the phrase first used by Lord Wrenbury in the *Ocean* case (2) and

(1) [1928] Ch. 484.

(2) [1927] A. C. 271, 284.

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now adopted by the House of Lords in *Anchor Donaldson, Ld.* v. *Crossland* (1)) to continue the payments. And, for myself, I can see no distinction between the case where the incapacity is disputed by the employer and the case where it is alleged that the termination or diminution is made by agreement. In *Anchor Donaldson, Ld.* v. *Crossland* (1) Viscount Dunedin quotes certain observations of Lord Atkinson in the *Ocean* case (2): "I think it is clear that the object of this provision was to deprive the employer of the power or right, to which he was theretofore entitled, arbitrarily, at his own will and pleasure, to end or diminish the weekly payment. Under this section he may still terminate the weekly payment if, in the doing of that, he acts 'in pursuance of an agreement or arbitration.'" And Lord Dunedin, commenting on that observation, continues as follows: "With great deference to Lord Atkinson, to my mind this dictum is quite unintelligible. The prior right existing to end or diminish must either refer to the right to end or diminish a payment de jure or de facto 'to which he was theretofore entitled.' He never was entitled to end a payment de jure. As to a payment de facto, which also he was never entitled to end at his own hand, but which he could end, the very case allowed him to do it, provided that it should be found in pursuance of an arbitration that he was right as to the recovery. But an employer who ends the payment at his own hand does not go to arbitration; it is the workman who, finding his money stopped, invokes arbitration. To hold that an employer who is brought into that arbitration as a defendant has stopped antecedently the payment in pursuance of arbitration, is a proposition that I cannot comprehend." It seems to me that if the words "in pursuance of an agreement," the existence of which would equally have to be litigated at the subsequent arbitration, be substituted for the word "arbitration," the observations of Lord Dunedin commenting upon the speech of Lord Atkinson, and agreeing with the view of Lord Buckmaster in the *Anchor Donaldson* case (3), go

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(1) [1929] A. C. 297, 313. (2) [1927] A. C. 271, 284.
(3) [1929] A. C. 297, 305.

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very far to destroy the contention raised by Mr. Morgan, that when once the employer is able to set up a scintilla of an agreement s. 12 does not operate. It occurs to me very forcibly that if Mr. Morgan were right, it would be open in every case to an employer to set up an agreement possibly on quite insufficient grounds and so to destroy the effect of s. 12 altogether. In my opinion, the question of the existence or non-existence of an agreement, equally with the question of the existence or non-existence of a termination or ending by arbitration, and the question of incapacity, are all matters which fall to be decided in the arbitration itself. The learned county court judge here has been at pains to say that he decides nothing as to the ultimate rights between the parties. He says: "This is only an interim arbitration. One of the matters which still have to be decided when the arbitration takes place is the question whether these payments were ended or terminated by reason of an agreement. To decide otherwise would be to nullify the section."

Solicitors: *Smith and Hudson, for Bates, Mountains & West, Grimsby; Botterell & Roche, for Chamberlin, Talbot and Bracey, Great Yarmouth.*

H. C. G.

POCKNEY *v.* ATKINSON.

1929
July 15, 16.

Master and Servant—Agricultural Labourer—Wages—Agreement to serve for Period—Lump Sum to be paid at End of Period—Refusal of Labourer to complete his Contract—Liability of Employer to pay Wages at Minimum Rate for Period while Labourer in Employment—Agricultural Wages (Regulation) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 37), *s.* 7.

By the Agricultural Wages (Regulation) Act, 1924, s. 7, sub-s. 1: " . . . . any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate. . . . ."

By sub-s. 10: " Any agreement for the payment of wages in contravention of this Act . . . . shall be void."

By a parol contract an agricultural worker was hired for a period from December 4, 1927, to November 23, 1928, at a wage of 48*l.* 10*s.* and his board and lodging, being a rate of wages in accordance with that required to be paid under the Agricultural Wages (Regulation) Act, 1924, and the Orders made thereunder. The 48*l.* 10*s.* was agreed to be due and payable upon November 23, 1928, provided the worker duly performed his obligations under the contract. Upon July 12, 1928, the worker, having refused to obey a lawful order given by his employer, wrongfully left his employment and refused to complete his contract. The employer had not paid to the worker wages week by week in respect of the period worked.

An information was laid against the employer for not paying to the worker wages at a rate not less than the minimum rate as fixed under the provision of the Agricultural Wages (Regulation) Act, 1924, and the Orders made thereunder, it being contended that the Act and Orders imposed upon the employer an obligation to pay wages to an agricultural worker week by week:—

Held, that the Act of 1924 and the Orders made thereunder did not impose upon the employer of an agricultural worker an obligation to pay the worker week by week wages at not less than the minimum rate; and also that the agreement for the payment of wages that was made in the present case was not in contravention of the Act merely because it contemplated the payment of a lump sum only at the end of the period of employment.

Hampton v. *Smith* [1920] W. N. 46; 89 L. J. (K. B.) 413 applied and followed.

CASE stated by justices for the North Riding of Yorkshire.

An information was preferred, at a court of summary jurisdiction sitting at Pickering, by the appellant, R. P. Pockney, against the respondent, J. G. Atkinson, for that he on or about November 23, 1928, being a person who employed John Husband, a worker in agriculture, did not pay wages to John Husband at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924, and the Orders of the Agricultural Wages Board made thereunder, No. 267, dated December 19, 1927, and No. 299, dated September 25, 1928, and the Orders of the Agricultural Wages Committee for the North Riding of Yorkshire dated November 27, 1927.

Upon the hearing of the information on February 4, 1929, the following facts were proved or admitted :—

The appellant was a person authorized by law to institute proceedings under the Agricultural Wages (Regulation) Act, 1924, and he accordingly laid the information against the respondent on January 8, 1929.

The respondent on or about December 4, 1927, entered into a parol contract with the said John Husband as a worker in agriculture on the respondent's farm called Lodge Farm, Sinnington.

By the terms of the contract the worker, John Husband, was hired for a period from December 4, 1927, to November 23, 1928, at a wage of 48*l*. 10*s*. and his board and lodging, being a rate of wage in accordance with that required to be paid under the Agricultural Wages (Regulation) Act, 1924 (1), and the Orders made thereunder, and the said 48*l*. 10*s*. was agreed to be due and payable upon November 23, 1928, provided that the said John Husband duly performed his obligations under the contract.

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(1) Agricultural Wages (Regulation) Act, 1924, s. 7, sub-s. 1: "Where any minimum rate of wages has been made effective by an order of the Agricultural Wages Board under this Act, any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate, and, if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine . . . ."

Sub-s. 10: "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void."

The Orders made by the Agricultural Wages Board provided for payment of wages to agricultural workers at not less than certain prescribed minimum rates (according to the age of the worker) per week of 48 hours in winter and 52½ hours in summer.

The Orders made by the Agricultural Wages Committee for the North Riding of Yorkshire provided that board and lodging, where provided by the employer, should be counted as wages at the rate specified therein.

Upon July 12, 1928, John Husband, having refused to obey a lawful order given by the respondent, left the employment of the respondent without notice and in breach of his contract, and refused to complete the contract.

During the whole of the period from December 4, 1927, to July 12, 1928, John Husband had been provided with full board and lodging, and at various dates during the said period ex gratia cash advances amounting in the whole to a sum of 9*l.* 10*s.* had been made by the respondent to the said John Husband. In addition the respondent had paid ninepence per week National Health Insurance contribution for and on behalf of the said worker.

The respondent had made such ex gratia cash payments as aforesaid on account of such amount as would become due and payable on November 23, 1928, to John Husband.

If, as contended by the appellant, wages were due to the said John Husband in respect of the period during which he was in the employment of the respondent—namely, from December 4, 1927, to July 12, 1928, the amount so due, after allowing for payments made as set out above, was 20*l.* 8*s.* 6*d.*

It was contended on behalf of the appellant (*a*) that s. 7, sub-s. 1, of the Agricultural Wages Act, 1924, imposed upon the respondent a liability to pay wages to the said John Husband in respect of the period during which he was in the employment of the respondent—namely, from December 4, 1927, to July 12, 1928, at a rate not less than the minimum rate laid down by the Orders of the Agricultural Wages Board and the Agricultural Wages Committee; (*b*) that the respondent was not relieved of that liability by reason of the fact that John Husband terminated his employment before November 23, 1928, in breach of his contract; (*c*) that such wages were due and payable to John Husband, and that the respondent had failed to comply with s. 7, sub-s. 1, of the Act of 1924.

It was contended on behalf of the respondent (*a*) that at common law the respondent was not liable to pay wages to John Husband at all, as no wages had accrued due to him at the date of the breach of contract on the part of John Husband; (*b*) that the Agricultural Wages Act, 1924, provided for the fixing of minimum rates of wages in cases where an employer was under a contractual liability to pay wages to a worker in agriculture, but did not impose an obligation to pay wages at the fixed or any rate where there was no contractual liability to pay wages at all; (*c*) that since on account of his failure to perform his contract no wages were contractually due to John Husband no offence against s. 7, sub-s. 1, of the Agricultural Wages Act, 1924, had been committed.

The attention of the justices was called to *Hampton* v. *Smith*. (1)

The justices held that since the said John Husband had on July 12, 1928, failed and refused to complete his contract no wages were due to him and no offence had been committed under s. 7, sub-s. 1, of the Agricultural Wages (Regulation) Act, 1924, and they thereupon dismissed the information.

Hubert Hull for the appellant. The justices were wrong in dismissing this information. The Agricultural Wages (Regulation) Act, 1924, by s. 7, sub-s. 1, imposed upon the respondent a liability to pay wages to Husband in respect of the period during which Husband was in the respondent's employment—namely, from December 4, 1927, to July 12, 1928, at a rate not less than the minimum rate laid down by the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the North Riding of Yorkshire, notwithstanding that under the contract of service the respondent was only liable to pay a fixed sum at the end of the period of employment. The respondent was not relieved of that liability by reason of the fact that Husband terminated his employment before November 23, 1928, in breach of his contract. The contract of employment which Husband entered into with the respondent was void under s. 7, sub-s. 10, of the Act of 1924, as being in contravention of the Act, and therefore the respondent cannot rely upon that contract as a justification for not paying wages. A similar point arose under the Coal Mines (Minimum Wage) Act, 1912, in the House of Lords in *Churm* v. *Dalton Main Collieries, Ld.* (1) In that case Lord Shaw of Dunfermline said (2) that the Act of 1912—which provides in s. 1, sub-s. 1, that "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act . . . ."—"gives to the workman an absolute right and imposes upon the employer an absolute obligation. The statute does not say that the implied term is only to enter a contract if the employer has already under it become bound to pay some wages, or to pay individual wages, to each individual workman." Another case under the same Act of 1912 was *Hooley* v. *Butterley Co., Ld.* (3) In that case Sir Robert Finlay K.C. put with great force the same argument which is being advanced to-day on behalf of the respondent. He said (4): "The Minimum Wage Act has not extended the liability to pay a minimum wage to any person who was not liable for wages before the passing of the Act. It deals not with liability but with quantum. Its object is not to impose a liability to pay wages, but to fix the minimum where the employer is already liable to pay." But the Law Lords expressly laid down in very clear terms that it was not necessary before the Act applied to find an obligation on the employer outside the Act to pay wages. Lord Haldane said (5): "The result of this legislation appears to me quite unambiguous. Parliament has decided that where a workman is employed underground in a coal mine it is to be a term of the contract of employment that the employer is to pay wages at not less than the minimum rate. The Act applies whenever there is such a contract of employment. It does not matter whether the employer is under the contract expressed to be liable to pay the wages or not. The statute makes him liable if he is the employer." It is therefore clear that s. 7, sub-s. 1, of the Agricultural Wages (Regulation) Act, 1924, imposes an absolute liability upon the employer to pay wages at the minimum rate and that it does not merely deal with the quantum of the wages.

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(1) [1920] W. N. 46; 89 L. J. (K. B.) 413.

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(1) [1916] 1 A. C. 612.
(2) Ibid. 634.
(3) [1916] 2 A. C. 63.
(4) Ibid. 68.
(5) [1916] 2 A. C. 73.

[LORD HEWART C.J. In the present case the employer does not say that the Act does not apply; he admits that the Act does apply, and says that he was going to pay wages at the rate prescribed by the Act, but that the man ran away, and that therefore it was his own fault that he did not receive those wages.]

In both of the cases in the House of Lords, *Churm's* case (1) and *Hooley's* case (2), the employers were under no contract to pay wages. The obligation to pay wages in both cases had to be found under the Coal Mines (Minimum Wage) Act, 1912, outside the contract of employment.

[BRANSON J. In neither of those cases was any point made of the man having failed to carry out his contract.]

The House of Lords decided in those cases that there was an obligation imposed by the Act to pay wages at not less than the minimum rate apart altogether from the contract of employment.

[BRANSON J. One knows that in agriculture there is both winter and harvest work, and that agricultural labourers often enter into a contract of service for a year which will include both classes of work. If your contention is correct a man might obtain wages at not less than the minimum rate during the winter months with board and lodging, and then leave his employer and earn double wages as soon as harvest work commences.]

The employer whose service he had left would have his remedy at law. Salter J. made some observations upon the Act of 1924 in *Jones* v. *Harris* (3) which show that in his opinion it was not open to an employer to say that he was not liable to pay wages.

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(1) [1916] 1 A. C. 612.

(2) [1916] 2 A. C. 63.

(3) [1927] 1 K. B. 425, 434.

[AVORY J. In that case the worker had not broken his contract.

LORD HEWART C.J. Your point is that a contract which provides that a man may work for many weeks without receiving wages is contrary to the Act.]

That is so. If my contention is correct the Act of 1924 imposes upon an employer an obligation to pay wages at not less than the minimum rate irrespective of any contract of employment.

[LORD HEWART C.J. The Order made by the Agricultural Wages Board under the Act of 1924 fixes the rate of wages per week, which varies in length according to whether it is summer or winter, being 48 hours in the winter and 52½ hours in the summer. Does not that indicate that what the Act does is to fix a rate rather than to impose a liability?]

Under s. 7, sub-s. 3, of the Act of 1924 the employer is to be ordered by the Court to pay " such sum as may be found by the Court to represent the difference between the amount which ought at the minimum rate applicable to have been paid to the worker during the period of six months immediately preceding the date on which the information was laid or the complaint was served and the amount actually paid to him during that period." There are persons employed in agriculture where there is no contract of employment, such as the pickers in the hop gardens. The decision in this case will directly affect them. Any agreement to pay wages at the end of a period—say of twelve months—even though the amount to be paid then is greater than the minimum rate specified in the Act, is pro tanto bad as being contrary to the Act. Wherever such a contract is made if it is not carried out by the worker payment of wages must be made to him by the employer for the broken period worked at the minimum rate specified in the Act and the Orders made thereunder.

C. S. S. Burt (*Harold Murphy* with him) for the respondent. The form of contract entered into between the employer and the worker in this case is one that has existed for very many years. It would be going a long way to hold that such a contract is contrary to the intention of the Agricultural Wages (Regulation) Act, 1924, unless the words of the Act are quite clear to that effect. Sect. 7, sub-s. 1, of the Act does not impose a liability to pay wages apart altogether from the liability at common law under the contract of employment. Sect. 16, which defines the meanings of the words used in the Act, expressly says that "the expression 'employment' means employment under a contract of service or apprenticeship." A very similar point to the one in the present case arose in *Hampton* v. *Smith* (1) under s. 4, sub-s. 1, of the Corn Production Act, 1917, which is almost identical in terms with s. 7, sub-s. 1, of the Act of 1924. In that case a worker in agriculture was engaged for a year and was to be paid a lump sum at the end of that period. The information—which related to a date before the expiration of that period—against the employer was for not paying wages at the minimum rate.

[LORD HEWART C.J. In that case if the worker had served his time he would have been paid his wages, but in the present case the employer refuses to pay wages to the man because the man did not carry out his contract to serve a certain time.]

The contention was put forward in that case that a contract to pay wages at the end of the year's service was bad as being contrary to the statute, which required that workers should be paid weekly. That is the same as the contention put forward in the present case. The Court, however, in *Hampton* v. *Smith* (1) refused to accept that contention. Lord Reading C.J. said (2): "There is all the difference in the world between saying that a man shall be paid at a certain rate per week and saying that he shall be paid weekly at that rate." Avory J. also said (3): "One cannot find in the Act or in the Orders any indication that the Legislature intended to interfere with the right which the employer and the workman have to enter into a contract that the workman shall be engaged for a year, and shall be paid at the end of the year." He went on to say: "There being no indication of such an intention on the part of the Legislature, we are not justified in reading into s. 4, sub-s. 1, words that are not there." Those dicta are directly in point in the present case. If a man by his own default disentitles himself from receiving a lump sum at the end of the period for which he contracted to work, he is not entitled, nevertheless, to be paid week by week at the rate specified in the Act or in the Orders made thereunder.

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(1) 89 L. J. (K. B.) 413.

(2) 89 L. J. (K. B.) 414.

(3) 89 L. J. (K. B.) 415.

Hubert Hull in reply. The object of the Act of 1924 is to provide that an agricultural labourer shall receive such a sum of money as will keep him in comfort. *Hampton* v. *Smith* (1) has no application to the present case, as the attention of the Court in that case was not directed to the two cases in the House of Lords of *Churm* v. *Dalton Main Collieries, Ld.* (2), and *Hooley* v. *Butterley Co., Ld.* (3) Further the Act of 1924 contains certain terms which are not in the Corn Production Act, 1917. Under sub-s. 2 of s. 7 of the Act of 1924 the onus lies on the person against whom proceedings are taken under s. 7 of proving that he has paid wages at not less than the minimum rate.

LORD HEWART C.J. This is a case stated by justices for the North Riding of Yorkshire which raises an interesting question under the Agricultural Wages (Regulation) Act, 1924. An information was preferred in January last by the present appellant against the present respondent for that he, upon November 23, 1928, being a person who employed John Husband, a worker in agriculture, did not pay wages to him at a rate not less than the minimum rate as fixed under the provisions of the Act and the Orders of the Agricultural Wages Board made under the Act, and the Orders of the Agricultural Wages Committee for the North Riding of Yorkshire. The justices, having heard the information, dismissed it, and the question for this Court is whether, in

(1) 89 L. J. (K. B.) 413.

(2) [1916] 1 A. C. 612.

(3) [1916] 2 A. C. 63.

so deciding, they came to a correct determination in point of law.

The facts, it would appear, were not in dispute. It is found that the respondent on or about December 4, 1927, entered into a parol contract with John Husband whereby the respondent was to employ him as a worker in agriculture on the respondent's farm. By the terms of that contract Husband was hired for a period from December 4, 1927, to November 23, 1928, at a wage of 48*l.* 10*s.* together with his board and lodging, and the case finds as a fact that that wage was a rate of wage in accordance with that required to be paid under the Agricultural Wages (Regulation) Act, 1924, and the Orders made under it. The case finds further that that sum of 48*l.* 10*s.* was agreed to be due and payable upon November 23, 1928, provided that Husband duly performed his obligations under the contract. In other words, so far as mere quantum was concerned, there was nothing deficient in this rate of payment. But upon July 12, 1928, Husband, having refused to obey a lawful order given by the respondent, left the employment of the respondent without notice and in breach of his contract, and refused to complete his contract. There are further findings in the case as to the provision of full board and lodging and as to certain ex gratia cash advances, and so forth, which are not material for the present purpose. In those circumstances the justices held that inasmuch as Husband had on July 12, 1928, failed and refused to complete his contract, no wages were due to him, and that no offence had been committed under s. 7, sub-s. 1, of the Agricultural Wages (Regulation) Act, 1924.

The contention which was urged on behalf of the appellant, and has been repeated before us in the very able argument of Mr. Hull, is that s. 7, sub-s. 1, of the statute of 1924 imposed upon the respondent a liability to pay wages to Husband in respect of the period during which Husband was in the employment of the respondent—namely, from December 4, 1927, to July 12, 1928, at a rate not less than the minimum rate laid down by the Orders of the Wages Board and the Wages Committee. In like manner it was and is now contended that the respondent was not relieved of that liability by reason of the fact that Husband terminated his employment before November 23, 1928, in breach of his contract. [His Lordship having read s. 7, sub-ss. 1 and 10, of the Agricultural Wages (Regulation) Act, 1924, continued :] The first question which arises is whether it is true to say that the agreement for the payment of wages, which is found to have been made in this case, was an agreement in contravention of the Act. In my opinion it was in no sense in contravention of the Act. So far as the question of amount is concerned, it is expressly found, nor is it sought to be denied, that the lump sum of 48*l.* 10*s.* for the whole period, considered together with the provision of board and lodging, was such as to amount to a rate of wage in accordance with the statute and the Orders made under it. But it is suggested, though I think only faintly suggested, that the agreement was in contravention of the Act inasmuch as it contemplated, so far as money is concerned, the payment of a lump sum only at the conclusion of the whole period. If that argument is seriously meant it seems to me to be inconsistent with the decision of this Court in *Hampton* v. *Smith.* (1) In that case the matter arose under very similar words of the Corn Production Act, 1917, which by s. 4, sub-s. 1, provided as follows : "Any person who employs a workman in agriculture shall pay wages to the workman at a rate not less than the minimum rate as fixed under this Act and applicable to the case, and if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine." That Act further provided by sub-s. 3 of that section that any agreement for the payment of wages in contravention of the section should be void. In that case the respondent, at the beginning of January, 1919, entered into a contract with a man named Allan whereby he was to employ Allan as a workman in agriculture for the period of one year from January 6, 1919, at a wage of 20*l.*, equivalent to 7*s.* 8*d.* a week, together with board and lodging. In fact Allan served the respondent from January 6, 1919, until September 8, 1919, which was the date of the information.

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(1) 89 L. J. (K. B.) 413.

1929

POCKNEY v. ATKINSON.

Lord Hewart C.J.

The information preferred by the appellant in the case was that the respondent on divers days between January 6 and September 8, 1919, being a person who employed Allan, a workman in agriculture, did not pay wages to Allan at a rate not less than the minimum rate as fixed under the Corn Production Act, 1917. The justices found in favour of the employer, but stated a case which came before this Court. It was then urged against the employer that an offence had been committed under s. 4, sub-s. 1, of the Act of 1917 at the time when the respondent entered into the agreement, inasmuch as it was an agreement to pay less than the minimum wage. It was said that the respondent could not set up the contract and allege that under it no payment of wages was due until the end of the year's service, because it was void under sub-s. 3 of the section. The learned counsel who appeared for the appellant said in terms: "The scheme of the Act is that the labourer shall be paid weekly." The Divisional Court, consisting of Lord Reading C.J., Avory J. and Sankey J., as he then was, unanimously dismissed the appeal from the justices' decision in favour of the employer. Lord Reading C.J. in the course of his judgment said this (1): "The difficulty in the appellant's case is that he can only succeed if the effect of the Corn Production Act, 1917, is to provide that the minimum rate of wages payable per week shall in fact be paid per week. There is all the difference in the world between saying that a man shall be paid at a certain rate per week and saying that he shall be paid weekly at that rate; and this is all the more important when one remembers that, under this class of contract, a general hiring is for twelve months, according to the common law." Avory J. also said (2): "In such a case the question is whether the Act provides that the workman is to be paid his wages weekly, week by week. One cannot find in the Act or in the Orders any indication that the Legislature intended to interfere with the right which the employer and the workman have to enter into a contract that the workman shall be engaged for a year, and

(1) 89 L. J. (K. B.) 414.

(2) 89 L. J. (K. B.) 415.

shall be paid at the end of the year, and that the ordinary custom shall prevail of the employer making advances on account of wages. There being no indication of such an intention on the part of the Legislature, we are not justified in reading into s. 4, sub-s. 1, words that are not there. The scheme of the Act and the Orders is simply to provide the rate at which wages are to be paid. It is quite consistent with that scheme that they should be paid every month, every half-year, or every year." That decision, in my opinion, has a direct bearing upon the present case, and in the face of that decision it is not possible for this Court to say that such an agreement as that which is found to have been made in this case was contrary to the statute inasmuch as it contemplated, so far as money went, the payment only of a lump sum at the end of a comparatively protracted period.

It was, however, urged by Mr. Hull that the attention of the Court in *Hampton* v. *Smith* (1) was not directed to two cases under the Coal Mines (Minimum Wage) Act, 1912. Those cases are *Churm* v. *Dalton Main Collieries, Ld.* (2) and *Hooley* v. *Butterley Co., Ld.* (3) But it does not appear to me that the decisions in those cases, crucial as they were under the statute to which they related, throw much light upon the problem now before us. No doubt as a result of those cases it is true to say that where the relation of employer and employed, in a kind of industry to which the statute refers, is proved, it matters not that the mode of payment is circuitous, the worker who is employed is entitled to say: when you pay me you shall pay me at a rate not less than the statute requires. But that is a very different thing from saying that where there is an agreement between the parties for a rate of payment which is consistent with the requirements of the statute, and the fact of that payment is prevented only by default on the part of the workman who, refusing to obey a lawful order, leaves his employer without notice, the statute nevertheless implies that for the broken period worked by the workman, although he could not sue upon a quantum meruit, never having fulfilled his contract, the statutory rate is applicable. It is one thing to say that where there is no express agreement about the rate of wages the statute will require that wages at not less than the minimum rate shall be paid; or that, where the rate of wages agreed to be paid is less than the statutory minimum, the statute will make the agreement void and insist upon wages at not less than the minimum rate being paid. But it seems to me to be a long way from those propositions to say that where there has been an agreement between the parties to pay wages in conformity with the statute, and the payment is defeated only by a breach of contract on the part of the workman himself, nevertheless there is to be implied from the statute an obligation on the part of the employer to pay in respect of the broken period of actual work, in accordance with the rate which the statute lays down. I cannot find any such provision in the Act. If it were in the Act, it would be a most important provision. I think, therefore, that there are no materials here upon which we are entitled to say that these justices erred in point of law in coming to the conclusion to which they came in favour of the employer.

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(1) 89 L. J. (K. B.) 413. (2) [1916] 1 A. C. 612.
(3) [1916] 2 A. C. 63.

In those circumstances it appears to me that this appeal fails.

AVORY J. I am of the same opinion, and cannot usefully add anything to the exhaustive judgment which my Lord has delivered.

BRANSON J. I agree.

Appeal dismissed.

Solicitor for appellant: *Solicitor to Ministry of Agriculture and Fisheries.*

Solicitors for respondent: *Ellis & Fairbairn.*

R. F. S.

ALLEN *v.* WHITEHEAD.

1929
July 19.

Refreshment House—Harbouring Prostitutes—Master and Servant—Knowledge of Servant in Charge of Premises—Ignorance of Master—Servant acting contrary to Master's Instructions—Liability of Master for Acts of Servant—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 44.

The occupier and licensee of a refreshment house in the Metropolitan Police District, while receiving the profits of the business, did not himself manage the refreshment house, but employed a manager for that purpose. A number of women known to the manager to be prostitutes resorted to the refreshment house on a number of consecutive days and stayed there for several hours in the night time. The occupier had expressly instructed his manager that no prostitutes were to be allowed to congregate on the premises. The occupier only visited the premises once or twice a week and had no personal knowledge of what had taken place:—

Held, that the occupier was liable to be convicted under s. 44 of the Metropolitan Police Act, 1839, of knowingly suffering prostitutes to meet together in his refreshment house and remain therein, inasmuch as having delegated his duty, so far as the conduct of the house was concerned, to his manager, the knowledge of the manager must be imputed to the employer.

Case stated by a Metropolitan Police magistrate.

An information was laid at the Old Street Police Court by the appellant, John Allen, by order and on behalf of the Commissioner of Metropolitan Police, which charged that the respondent, Albert Whitehead, on February 26, 1929, being the keeper of premises—namely, 16 Norton Folgate, in the County of London, where refreshments were sold or consumed, did knowingly suffer prostitutes to meet together and remain therein contrary to s. 44 of the Metropolitan Police Act, 1839. (1)

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(1) Metropolitan Police Act, 1839, s. 44: "And whereas it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort; Be it enacted, that every person who shall have or keep any house, shop, room, or place of public resort within the metropolitan police district, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, (whether the same shall be kept or retailed therein or procured elsewhere,) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room or place . . . . or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than five pounds. . . . ."

The following facts were proved or admitted on the hearings on April 22 and May 2, 1929:—

(*a*) The respondent was the occupier and licensee of premises at 16 Norton Folgate, Stepney, which he used as a licensed refreshment house open day and night.

(*b*) The respondent, although he received the profits of the business, did not himself manage the refreshment house but employed a manager for the purpose.

(*c*) On February 26, 1929, and on each of the seven days following, a number of women known to the respondent's manager to be prostitutes resorted to the said refreshment house, meeting there together and with a number of men, and remaining therein between the hours of 8 P.M. and 4 A.M. and indulging in obscene language. From time to time men and women were seen to leave the premises in couples and to return within a few minutes. This conduct took place frequently in the presence of the manager, and on one occasion disorderly conduct took place on the part of those resorting to the café.

(*d*) On September 1, 1928, the respondent was warned by the police about harbouring prostitutes at the said refreshment house, and he thereupon gave instructions to his manager that no prostitutes were to be allowed to congregate in the premises, and a notice was displayed forbidding women to enter the refreshment house after midnight.

(*e*) The respondent visited the premises about once or twice a week. There was no evidence that misconduct occurred on any occasion in his presence or to his knowledge, but there was evidence that he had given general instructions to his manager to prevent the assembling of prostitutes on the premises, and had caused a notice to this effect to be displayed on the walls.

On behalf of the respondent it was contended that as the respondent did not himself manage the refreshment house, and had no personal knowledge that prostitutes met together and remained therein, and had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to the said facts, he could not in law be held responsible for the acts of his manager in his absence acting in direct contravention to his instructions.

On behalf of the appellant it was contended that the position of the respondent was analogous to that of a licensee under the Licensing Acts, and that he was responsible for the acts of his manager within the scope of his employment. Attention was called to ss. 75 and 76 of the Licensing Act, 1910. The cases of *Wilson* v. *Stewart* (1); *Commissioners of Police* v. *Cartman* (2); *Bond* v. *Evans* (3); and *Collman* v. *Mills* (4) were referred to.

The magistrate considered that *Wilson* v. *Stewart* (1) was the only case to which he was referred which was a decision on the same section as in the present case. The observations of Blackburn J. in that case seemed to indicate clearly that in his view a complete absence of knowledge of misconduct would have afforded a good defence. The magistrate accordingly felt bound, relying on those observations, to dismiss the information, being of opinion that the respondent was not responsible in law for the acts of his manager under the above circumstances, such acts having taken place without the respondent's knowledge and contrary to his express instructions.

The question of law for the opinion of the Court was whether upon the facts stated the magistrate was right in dismissing the information.

H. D. Roome for the appellant. This case raises the question of the criminal responsibility of a master for the acts of his servant committed contrary to his instructions and without his knowledge. Atkin J. stated the law with reference to this matter in *Mousell Brothers* v. *London and North Western Ry.* (5) as follows: "I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an

(1) (1863) 3 B. & S. 913; 27 J. P. 661; 32 L. J. (M. C.) 198.

(2) [1896] 1 Q. B. 655.

(3) (1888) 21 Q. B. D. 249.

(4) [1897] 1 Q. B. 396.

(5) [1917] 2 K. B. 836, 845.

act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed." Those six considerations govern the law to be applied, and having regard to those considerations the magistrate was wrong in dismissing the information. The object of s. 44 of the Metropolitan Police Act, 1839, is stated at the commencement of the section and is to extend the provisions made for preventing disorderly conduct in the houses of licensed victuallers to other houses of public resort, and it goes on to impose a penalty on keepers of refreshment houses who knowingly permit prostitutes to meet together and remain therein. The case of *Wilson* v. *Stewart* (1), upon which the magistrate relied, affords no assistance in this case. It is the converse case to the present. The question in that case was not whether a master could be held criminally liable for the acts of his servant, but whether the servant could be held criminally liable for the acts of his master.

[LORD HEWART C.J. It appears from the remark made by Blackburn J. in the course of the argument, as reported in the Justice of the Peace (2), that the question asked by the magistrate in the case was "if the mere relation of master and servant will make the servant liable to conviction," and Blackburn J. pointed out that that mere fact would not be enough.]

In *Mullins* v. *Collins* (3) the servant of a licensed victualler knowingly supplied liquor to a constable on duty without the authority of his superior officer, and it was held that the licensed victualler was liable to be convicted although he had no knowledge of the act of his servant. Blackburn J. said (4):

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(1) 3 B. & S. 913; 27 J. P. 661; 32 L. J. (M. C.) 198.

(2) 27 J. P. 661, 662.

(3) (1874) L. R. 9 Q. B. 292.

(4) L. R. 9 Q. B. 295.

"If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect."

[BRANSON J. In that case Archibald J. called attention to the fact that the appellant had been convicted under the second sub-section of s. 16 of 35 & 36 Vict. c. 94, where the word "knowingly" was omitted, and observed that that pointed to the conclusion that the licensed victualler would be liable for the act of his servant, although he himself had not knowingly committed an offence against the sub-section. The Metropolitan Police Act, 1839, s. 44, on the other hand, contains the word "knowingly."]

In *Coppen* v. *Moore* (*No.* 2) (1) it was held that a master was criminally liable for acts done by his servants in contravention of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887 —which made it an offence to sell goods to which a forged trade-mark or false trade description was applied—when acting within the general scope of their employment, although contrary to their master's orders, unless the master could show that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission of offences by his servants. There the master had delegated his duty to his servants and had taken no further steps to see that the Act was complied with besides giving special instruction to his servants, and therefore he could not rely upon the special provisions of the Merchandise Marks Act, 1887, affording a defence in certain cases. If a master delegates to a servant the duty imposed upon him by s. 44 of the Act of 1839 to prevent prostitutes assembling on his licensed premises, and the servant knowingly permits prostitutes to assemble on the premises, the knowledge of the servant must be imputed to the master. In *Bond* v. *Evans* (2) gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance of the licensed person, and it was held that the licensed person had suffered gaming to be carried on on the premises within the meaning of s. 17 of the Licensing Act, 1872, and that he was rightly convicted. *Somerset* v. *Hart* (1) was distinguished in that case on the ground that there the servant was not in charge of the premises and there had been no delegation of authority to him. The principles of law applicable were stated by Lord Russell of Killowen C.J. in *Commissioners of Police* v. *Cartman* (2), where he said: "It is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to other persons: are the licensees in these latter cases to be liable under this section [s. 13 of the Licensing Act, 1872] for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. The scope of the manager's authority in my view receives its limitation from the scope of his employment: authority is given him to do all acts within the scope of his employment. It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be entirely defeated." *Collman* v. *Mills* (3) turned upon the true construction of a by-law of the London County Council with regard to slaughterhouses, and it was held that the respondent was liable for the act of his servant, as the act had been committed within the general scope of his employment, although contrary to the orders of his master. The word "knowingly" does not occur in any of the relevant statutes in the above mentioned cases, except in *Mullins* v. *Collins*. (4) But the use of that word does not add anything to the following words "suffer or permit" which constitute the gist of the offence. Of course there must be knowledge in some one.

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(1) [1898] 2 Q. B. 306.

(2) 21 Q. B. D. 249.

[BRANSON J. May not a licensee be said to have knowingly permitted some offence if he does not take steps to prevent it?]

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(1) (1884) 12 Q. B. D. 360.
(2) [1896] 1 Q. B. 655, 657.
(3) [1897] 1 Q. B. 396.
(4) L. R. 9 Q. B. 292.

In *Somerset* v. *Wade* (1) it was held that a licensed person could not be convicted of permitting drunkenness to take place on his premises where he did not know that a person on the premises was drunk who was in fact drunk. Therefore to say that a licensee knowingly permits anything if he does not take steps to prevent it would be construing the law more hardly than it is construed at present. In the present case the respondent had put the manager in his shoes, and had delegated his duties to him, and he only visited the premises once or twice a week after having been warned a few months earlier. Where there is delegation of authority by a master to his servant the knowledge of the servant is imputed to the master. Lord Coleridge C.J. said in the course of the argument in *Somerset* v. *Hart* (2): "It is true that a man may put another in his position so as to represent him for the purpose of knowledge." In cases under the Food Control Orders which were made under the Defence of the Realm Act, 1918, employers were held criminally liable for the acts of their servants, because otherwise the object of the statute would be defeated.

[*Jones* v. *Hartley* (3) was also cited.]

St. John Hutchinson for the respondent. *Somerset* v. *Hart* (2), which at first sight appears to be in the respondent's favour, does not apply, because the servant in that case was not in charge of the premises. The Metropolitan Police Act, 1839, is a penal statute, and therefore ought to be construed strictly. It is not suggested that the personal knowledge of the master is necessary in every case. A master may delegate to a servant authority to act, but he cannot delegate to him authority to think. If a servant supplies drink to a drunken man he is committing an absolute offence for which his master may be held liable. But in the present case the respondent's manager had to make up his mind upon two questions: first, whether these women were prostitutes, and secondly, whether they were remaining on the premises longer than was necessary. The answers to those two questions depended upon processes of thought and not upon an act. All the cases which have been cited relate to acts of a servant in permitting a forbidden act. In those cases knowledge was not necessary in order to make the master responsible. But where what is done is the result of a process of thought on the part of the servant actual knowledge of the master is necessary before he can be held liable for the acts of his servant. In *Commissioners of Police* v. *Cartman* (1) Lord Russell of Killowen C.J. said: "The scope of the manager's authority in my view receives its limitation from the scope of his employment: authority is given him to do all acts within the scope of his employment." Unless it can be found that a servant does an act within the scope of his employment it would be very dangerous to decide by the help of analogous cases that a master is liable for the process of mind of his servant which may result in an act.

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(1) [1894] 1 Q. B. 574.
(2) 12 Q. B. D. 360, 362.
(3) (1918) 82 J. P. 291.

LORD HEWART C.J. This is a case stated by one of the Metropolitan Police magistrates and it raises a question under s. 44 of the Metropolitan Police Act, 1839. The respondent was summoned to answer an information, laid by the appellant, which charged that the respondent on a day in February, 1929, being the keeper of certain premises where refreshments were sold or consumed, did knowingly suffer prostitutes to meet together and remain therein contrary to s. 44 of the statute. [His Lordship having read the material words of the section, continued:] The magistrate, having heard the evidence, came to the conclusion that the charge was not proved, and the question for this Court is whether he came to a correct determination in point of law in dismissing the case.

The facts of the case are simple enough. It is found as a fact that the respondent, who was the occupier and licensee of a refreshment house, which was open day and night, did not himself manage the premises. He received the profits of the business, but for the purpose of the conduct of the business he chose to employ a manager. In these circumstances it was proved that on a certain day in February, and on each of the seven days following, a number of women, known to the respondent's manager to be prostitutes, resorted to the refreshment house, meeting there together with a number of men and remaining therein between the hours of 8 P.M. and 4 A.M., and using obscene language. There are other findings of fact of a similar character. Before the happening of those events—namely, on September 1, 1928—the respondent had been warned by the police about harbouring prostitutes at this refreshment house. Having received that warning, he gave instructions to the manager that no prostitutes should be allowed to congregate in the premises, and, more than that, a notice was displayed forbidding them to enter the refreshment house after midnight. So far as the respondent's own acts are concerned, the case finds that he visited the premises about once or twice a week.

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(1) [1896] 1 Q. B. 655, 657.

Now what is the fair meaning of those facts, if it be not this, that the respondent was to all intents and purposes an absentee who had told his manager to use the discretion which, if he had been upon the premises, he must have used himself? The learned magistrate indeed appears to have thought that the case was governed by the decision in *Wilson* v. *Stewart*. (1) But somehow there seems to have been a misapprehension about that case, which was concerned not with the question in what circumstances is a master criminally liable for the act of his servant, but the converse question—namely, in what circumstances is the servant criminally associated with the act of his master? The point that was raised there was whether, in the words of Blackburn J., "the mere relation of master and servant will make the servant liable to conviction," and that question was naturally enough answered in the negative. With all due respect to the learned magistrate, it does not appear to me that that case throws much light upon the present case. The question here was whether it was true to say that the position of the respondent was analogous to that of a licensee under the Licensing Acts, in the sense that he was responsible

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(1) 27 J. P. 661, 662.

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Lord Hewart C.J.

for the acts of his manager within the scope of his employment. Now here, upon the facts of the case, it is abundantly plain that there was knowledge on the part of the manager. The question is whether upon the proper construction of s. 44 of the Metropolitan Police Act, 1839, that knowledge in the servant is to be imputed to the employer so as to make the employer liable. In my opinion, the answer to that question is in the affirmative. The principle seems to me to be that which was explained, for example, in *Mousell Brothers* v. *London and North Western Ry.* (1), where Atkin J. (as he then was) said (2): "I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed." Applying that canon to the present case, I think that this provision in this statute would be rendered nugatory if the contention raised on behalf of this respondent were held to prevail. That contention was this, that as the respondent did not himself manage the refreshment house and had no personal knowledge that prostitutes met together and remained therein, and had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to them, he could not in law be held responsible. There is a whole chain of cases on the lines of the passage which I have just read from *Mousell Brothers* v. *London and North Western Ry.* (1) Reference has been made to *Mullins* v. *Collins* (3); *Coppen* v. *Moore* (*No.* 2) (4); and *Bond* v. *Evans* (5) and other cases. This seems to me to be a case

(1) [1917] 2 K. B. 836.
(2) Ibid. 845.
(3) L. R. 9 Q. B. 292.
(4) [1898] 2 Q. B. 306.
(5) 21 Q. B. D. 249.

where the proprietor, the keeper of the house, had delegated his duty to a manager, so far as the conduct of the house was concerned. He had transferred to the manager the exercise of discretion in the conduct of the business, and it seems to me that the only reasonable conclusion is, regard being had to the purposes of this Act, that the knowledge of the manager was the knowledge of the keeper of the house. I think, therefore, that this case ought to go back to the learned magistrate with a direction to convict.

AVORY J. I am of the same opinion. I think the manager in this case, although acting contrary to his instructions in doing what he did, was acting in the course of his employment, and that being so, the employer is responsible for his acts.

With reference to the case of *Wilson* v. *Stewart* (1) I think it is plain that it is, when looked at carefully, an authority in support of the appellant's contention here, because it appears that in that case the proprietor of the business, one John Fryer, was not present on the premises at the time when the alleged offence was committed, but that the manager, as he is described, was on the premises and was the person who, in fact, was permitting the prostitutes to remain. Crompton J., in the course of his judgment, said (2): "I have no doubt that the Magistrate might have well found from the circumstances of the case, that Fryer"—that is the proprietor who was absent—"knowingly suffered prostitutes to meet together and remain in his house, and that Stewart aided and abetted him." So that upon the facts of the present case, the learned judges in that case apparently would have found that the employer was responsible.

I agree that the appeal should be allowed.

BRANSON J. I agree. The essence of the respondent's case was that he had no personal knowledge of the fact that prostitutes were meeting and remaining upon these premises. It is found that his manager knew, and Lord Coleridge C.J. said in *Somerset* v. *Hart* (3) "that a man may put another in his position so as to represent him for the purpose of knowledge." I think that is what the respondent has done here and that, consequently, the contention set up by the respondent fails.

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(1) 27 J. P. 661; 3 B. & S. 913; 32 L. J. (M. C.) 198.

(2) 32 L. J. (M. C.) 199.

(3) 12 Q. B. D. 360, 362.

I agree that the appeal should be allowed and that the case should go back to the learned magistrate with a direction to convict.

Appeal allowed.
Case remitted for conviction.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *Charles Watson Brown.*

R. F. S.

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July 24, 25.

THE MAYOR OF THE COUNCIL OF THE METROPOLITAN BOROUGH OF STOKE NEWINGTON *v.* RICHARDS.

Public Officer—Town Clerk—Retirement—Superannuation allowance—Computation—Inclusion of Fees received as Registration Officer—" Emoluments of his office "—Superannuation (Metropolis) Act, 1866 (29 *&* 30 *Vict. c.* 31), *s.* 4*—Representation of the People Act,* 1918 (7 *&* 8 *Geo.* 5, *c.* 64), *ss.* 12, 15, 16.

Where the town clerk of a metropolitan borough is by virtue of the Representation of the People Act, 1918, the registration officer of a registration area which is coterminous with the borough, the fees which he receives as registration officer are "emoluments" of his office as town clerk within the meaning of the Superannuation (Metropolis) Act, 1866, s. 4, and ought therefore to be taken into account along with his salary and other emoluments in calculating the superannuation allowance to be granted to him under the last-mentioned Act on his retirement from the office of town clerk.

Special Case stated by the Minister of Health under the Audit (Local Authorities) Act, 1927, s. 2, sub-s. 1.

The council of the metropolitan borough of Stoke Newington (hereinafter referred to as "the Council"), in their accounts for the financial year ended March 31, 1928, entered and charged the sum of 414*l.* as expenditure incurred in respect of the annual superannuation allowance of 414*l.*

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awarded by them under the Superannuation (Metropolis) Act, 1866 (1), to their former town clerk, Dr. Sidney White, upon his retirement from that office on January 31, 1927.

In computing that sum of 414*l.* the Council brought into calculation (inter alia) the fees received by Dr. White as registration officer under the Representation of the People Act, 1918, for the metropolitan borough (hereinafter referred to as "the borough"), and the proportion of the annual superannuation allowance which was calculated upon the basis of these fees was estimated at the sum of 43*l.* 2*s.* 6*d.*

Mr. John Nugent Richards (hereinafter referred to as "the respondent"), who was the assistant district auditor for the district which comprised the borough, during his audit of the accounts of the Council for the year ending March 31, 1928, by a certificate under his hand dated November 6, 1928, disallowed that sum of 43*l.* 2*s.* 6*d.* for the following reasons therein stated by him—namely: that the fees received by Dr. White as registration officer were not pensionable emoluments of his office of town clerk within the meaning of s. 4 of the Superannuation (Metropolis) Act, 1866 (1), and that the annual superannuation allowance of 414*l.* was over assessed to the extent to which it was based upon the amount of the fees received by the town clerk as registration

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(1) Superannuation (Metropolis) Act, 1866 (29 Vict. c. 31): Sect. 1. "The vestry of any parish and district board of any district or any other parochial body within the Metropolis, and also the Metropolitan Board of Works, may, at their discretion, grant to any officer in their respective services, including the chairman of the Metropolitan Board of Works, who shall become incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of mind or body, or of old age, upon his resigning or otherwise ceasing to hold his office, an annual allowance, not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances hereinafter contained, and shall charge such allowance to the fund or funds to which such salary would have been charged if he had continued in his office: Provided always, that nothing in this Act contained shall affect the powers contained in the two hundred and thirteenth section of the Metropolis Management Act, 1855."

Sect. 4. "Subject to the provisions herein contained, the allowance to be granted after the commencement of this Act to persons who shall have served in an established capacity as officers as aforesaid, whether their remuneration be computed by weekly wages, poundage or percentage on collection of

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officer; and the respondent surcharged that sum of 43*l.* 2*s.* 6*d.* upon Mr. Arthur John Treadwell the then mayor of the borough because he authorized the payment thereof to Dr. White.

The town clerk for the borough was necessarily the registration officer for the borough by virtue of the Representation of the People Act, 1918, s. 12. By virtue of s. 12, sub-s. 2, and s. 16, sub-s. 2, of that Act (1), where the registration area is a

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rates, or annual salary, shall be as follows; (that is to say,)

> To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the salary and emoluments of his office;

And in like manner an addition of one-sixtieth in respect of each additional year of such service until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted; and no addition shall be made in respect of any service beyond forty years; but in computing the time of an officer's service any period during which such officer shall have been in the service of a vestry, board of trustees, or other parochial board of the same parish superseded by "The Metropolis Management Act, 1855," or of any parish comprised in the district board granting such allowance, shall be included."

(1) Representation of the People Act, 1918: Sect. 12. "(1.) Each parliamentary borough and each parliamentary county shall be a registration area, and there shall be a registration officer for each registration area.

"(2.) Where the registration area is a parliamentary county and is coterminous with, or wholly contained in, one administrative county, the clerk of the county council, and where the registration area is a parliamentary borough and is coterminous with, or wholly contained in, one municipal borough, the town clerk of the borough shall be the registration officer for the area.

"In any other case such clerk of the county council, or town clerk, shall be registration officer for the area as the Local Government Board may by order direct, subject to any conditions which may be made by the order as to the appointment of deputies for any part of the area."

Sect. 15. "(1.) Any expenses properly incurred by a registration officer in the performance of his duties in relation to registration, including all proper and reasonable charges for trouble, care and attention in the performance of those duties, and any costs incurred by him as party to an appeal (in this Act referred to as 'registration expenses') shall be paid by the council whose clerk the registration officer is, or by whom he is appointed, subject, in cases where the registration area is not coterminous with or wholly contained in the area of that council, to such contributions by the council of any other county or borough as the Local Government Board may direct.

"Any such expenses shall be paid in the case of the council of a county out of the county fund, and if the case requires as expenses for special county purposes, and in the case of parliamentary borough and is coterminous with or wholly contained in one metropolitan borough, the clerk of the metropolitan borough council is to be the registration officer for the area. The parliamentary borough of Stoke Newington was coterminous with the metropolitan borough of that name.

The remuneration of registration officers was fixed by fees based on the number of electors according to a scale made by the Treasury under s. 15 of the Act of 1918, and during the period material to the calculation for the purposes of the award of the superannuation allowance was at about the rate of 112*l.* 10*s.* a year. The whole of the expenses of the registration of electors, including the remuneration of the registration officer, was in the first instance paid by the borough council as general expenses of the council, but a refund of one-half was later made by the Treasury to the borough council. (1)

On November 29, 1928, Mr. Treadwell by notice in writing appealed to the Minister of Health under the Audit (Local

the council of a borough out of the borough fund or borough rate, or, where there is no borough fund or borough rate, out of the fund or rate out of which the ordinary expenses of the council of the borough are paid."

"(4.) There shall be paid out of moneys provided by Parliament to the council of any county or borough in aid of the fund or rate out of which any registration expenses are paid by the council, in accordance with this Act, one-half of the amount so paid by the council."

Sect. 16. "(1.) Where an urban district is coterminous with a registration area which is a parliamentary borough or is wholly contained in such area, this Part of this Act shall apply to that district as it applies to a municipal borough, with the substitution of the clerk of the urban district council for the town clerk, of the urban district council for the council of the borough, of the general district rate for the borough fund or borough rate, and of the chairman of the council for the mayor.

"(2.) Any reference to a municipal borough in this Part of this Act shall include a reference to a metropolitan borough and the City of London, with the substitution, as respects a metropolitan borough, of the clerk of the metropolitan borough council for the town clerk, and of the metropolitan borough council for the council of the municipal borough, and as respects the City of London, of the Secondary for the town clerk and of the common council for the council of the municipal borough.

"Any registration expenses of a metropolitan borough council shall be paid as general expenses of the council, and any expenses of the common council shall be paid out of the general rate.

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(1) See note (1) ante, p. 224.

Authorities) Act, 1927, against the disallowance of the sum of 43*l*. 2*s*. 6*d*. and requested the Minister to state in the form of a special case for the opinion of the High Court the questions of law arising on the appeal.

It was contended on behalf of the appellant in answer to the respondent that he was aggrieved by the decision and certificate of the respondent; that the grounds stated for the surcharge in the certificate were not good in law; that inasmuch as the late town clerk, to whom the superannuation allowance was awarded, was by virtue of the Representation of the People Act, 1918, s. 12, sub-s. 2, and s. 16, sub-s. 2, necessarily the registration officer for the parliamentary borough of Stoke Newington, the salary or payments received by him for acting as registration officer were "emoluments of his office" of town clerk within the Superannuation (Metropolis) Act, 1866, and were properly included in the salary upon which his superannuation allowance was calculated and in respect of which the sum of 43*l*. 2*s*. 6*d*. was paid to him.

The following facts were admitted: That the superannuation allowance payable to Dr. White was governed by the provisions of the Superannuation (Metropolis) Act, 1866; that the Council by resolution dated January 18, 1927, awarded to Dr. White an annual superannuation allowance of 414*l*.; and that the sum of 43*l*. 2*s*. 6*d*. disallowed by the respondent represented the proportion of the annual superannuation of 414*l*. which was based upon the fees received by Dr. White as registration officer for the borough.

The question for the opinion of the Court was whether the Council had power when granting a superannuation allowance to their town clerk under the Superannuation (Metropolis) Act, 1866, to take into account the fees received by the town clerk as registration officer under the Representation of the People Acts.

Montgomery K.C. and *R. M. Hughes* for the appellant. The superannuation allowance granted to Dr. White on his retirement from the office of town clerk for the borough of

Stoke Newington was properly assessed, and the district auditor was wrong in disallowing and surcharging the proportion of that allowance which was based upon the fees received by him as registration officer. By virtue of the Representation of the People Act, 1918, ss. 12 and 16 (1), Dr. White as town clerk of the borough was also the registration officer for the borough. Under these provisions he, as town clerk, became registration officer necessarily and as a matter of course, and without being appointed or selected to that position by any person or body of persons. As town clerk he was bound to perform the duties of registration officer because the legislature has annexed these duties to the office of town clerk.

Under the Superannuation (Metropolis) Act, 1866, ss. 1 and 4 (2), Dr. White on his retirement from the office of town clerk became entitled to an annual superannuation allowance, which by the latter of these sections is to be proportionate not to the salary alone, but to the salary and emoluments of his office. The term "emoluments" includes all by which the holder of the office has benefited: per Blackburn J. in *Reg.* v. *Postmaster-General* (3), or that which the office is worth to the holder: per Bramwell L.J. in the same case in the Court of Appeal. (4) In view of the fact that Dr. White's appointment to the office of town clerk necessarily imposed upon him the duties of registration officer, the fees received by him as registration officer were therefore emoluments of his office as town clerk.

It clearly appears from the decided cases that an emolument means any payment coming to the holder of an office because he is the holder of the office. Thus, in *Rex* v. *Bridgewater Corporation* (5) where by the usage of a borough the duties of clerk to the justices had been appurtenant to the office of common clerk, it was held that, on the abolition of the office of common clerk, the person who had held that office was entitled to be compensated for loss of his fees as clerk to the justices, inasmuch as these fees were emoluments

(1) See note (1) ante pp. 224, 225.
(2) See note (1) ante, p. 223.
(3) (1876) 1 Q. B. D. 658, 665.
(4) (1878) 3 Q. B. D. 428, 430.
(5) (1837) 6 A. & E. 339.

of his office. In *Reg.* v. *Norwich Corporation* (*No.* 1) (1), where the office of steward of a borough had attached to it by the practice of the borough the office of holding a sheriff's court, it was held that on the abolition of the former office the steward was entitled to be compensated for loss of fees from the latter office. In *Reg.* v. *Norwich Corporation* (*No.* 2) (2), where the town clerk of a borough had transacted the business of the corporation as charity trustees as incidental to his office, it was held that on his removal by statute from the office of town clerk he was entitled to compensation not only for the loss of his office of town clerk, but also for the loss of his profits from the charity business. In *Reg.* v. *Poor Law Board* (3) the clerk to the guardians of a union who was an attorney, had been incidentally employed to conduct legal proceedings on behalf of the guardians, and on the abolition of his office by statute it was held that he was entitled to be compensated for the loss not only of his official salary, but also of his profits from the legal work done by him. Similarly, in *Drew* v. *Metropolitan Board of Works* (4), the clerk to a bridge company being a solicitor, certain of the duties of a solicitor were by the practice of the company attached to the office of clerk, and, on the clerk losing his office as such through the bridge being taken over by the Metropolitan Board of Works, it was held that he was entitled to compensation not only for loss of his salary as clerk, but also for loss of payments made to him as solicitor, these being part of the emoluments of his office. In *Rex* v. *Lyon. Ex parte Harrison* (5), where certain officers on the staffs of asylums were called upon to do special duties or extra work outside their contracts, in consideration of which they received special duty grants in addition to their ordinary salaries, these special grants were held to be "emoluments" of their offices for the purposes of superannuation. Several of these cases are stronger than this case, for in them the subsidiary employment was attached to the office by usage or practice only, whereas here the duties of registration officer were attached to the office of town clerk by statute. The case of *Kiddie* v. *Port of London Authority* (1) is distinguishable from the present case, inasmuch as there the benefit or advantage which was held not to be an emolument of the office was not an additional or incidental payment of any kind, but merely the employee's expectation of obtaining his pension on superannuation.

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(1) (1838) 8 A. & E. 633.

(2) (1842) 3 Q. B. 285.

(3) (1871) L. R. 6 Q. B. 785.

(4) (1883) 50 L. T. 138.

(5) [1921] 1 K. B. 203.

Hon. R. Stafford Cripps K.C. and *Ralph Sutton* for the respondent. The respondent as assistant district auditor rightly disallowed and surcharged the sum in question.

It is true that by the Superannuation (Metropolis) Act, 1866, ss. 1 and 4, the council of a borough may grant to an officer on his retiring from office by reason of age or infirmity a superannuation allowance, which by s. 4 is to be proportionate to "the salary and emoluments of his office"; and further, that by virtue of the Representation of the People Act, 1918, ss. 12 and 16, Dr. White because of his holding the office of town clerk of the borough of Stoke Newington was also the registration officer for the borough. It does not, however, follow that the fees received by him as registration officer were emoluments of his office of town clerk within s. 4 of the Act of 1866. In order that a payment made to an officer may be an "emolument" of his office within that section, which may be taken into account for the purpose of computing his superannuation allowance, it must be a payment closely connected with the salary of his office. Sects. 1 and 4 of that Act must be read together, and when so read they show that the policy of the Act is that the allowance is to be based upon the salary of the office and upon payments made in respect of some employment which may be regarded as forming part of the office, or in other words upon the salary and emoluments of the same nature as the salary. Sect. 1 provides that the allowance is not to exceed two-thirds of the officer's salary, and that it is to be charged to the fund to which his salary would have been charged if he had continued in office; thereby implying that the emoluments of which account can be taken must be intimately related to the salary.

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(1) (1929) 45 Times L. R. 430.

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Sect. 4 provides that the allowance shall be a certain proportion of the salary and emoluments "of his office," thus limiting the emoluments to payments having relation to the office, such as travelling expenses and other necessary official outgoings. The kind of payment that may be an "emolument" for the purposes of a superannuation Act appears from the case of *Rex* v. *Lyon. Ex parte Harrison* (1), and more particularly from the observations there made by Lord Reading C.J. on that point. (2)

The position held by Dr. White as registration officer was not so closely connected with his office of town clerk as to make the fees which he received for the performance of his duties as registration officer "emoluments" of that office within the meaning of s. 4 of the Act of 1866, and thus to render it necessary to take them into account in calculating his superannuation allowance. The town clerk of a borough is not in every case its registration officer. By s. 12 of the Act of 1918, where the registration area is coterminous with one municipal borough the town clerk of the borough shall be the registration officer for the area, but in any other case such town clerk shall be the registration officer for the area as the Local Government Board (now the Home Secretary) may direct. Thus, for example, where a registration area includes two boroughs or parts of boroughs the town clerk of one of these boroughs may be appointed registration officer for the area, in which case the town clerk of the other borough would not be the registration officer for the area in which his borough lay, or some person other than either of the town clerks might be appointed registration officer in which case neither of these town clerks would be registration officer. Even where the borough and the area are coterminous a redistribution of areas might at any time deprive the town clerk of the position of registration officer. The town clerk and the registration officer are not under the same authority. The town clerk is subject to the borough council, by whom he is appointed and controlled and may be dismissed. The registration officer is in no way subject to the borough council.

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(1) [1921] 1 K. B. 203.

(2) [1921] 1 K. B. 209.

By s. 12, sub-s. 2, of the Act of 1918, where the registration area and the borough are coterminous, the registration officer is appointed by force of that sub-section, the town clerk becoming the registration officer as a matter of course, and in any other case the registration officer is appointed by the Local Government Board (now the Home Secretary); and by s. 13 it is in every case the duty of the registration officer to comply with the directions of the Local Government Board (now the Home Secretary). The borough council have no power to appoint, control or dismiss the registration officer. They have power to appoint a town clerk, and when they do so they may no doubt be indirectly and in effect appointing him to be registration officer, but they have no direct and independent power of appointing a registration officer. While the borough council is always liable for all the proper expenses of the town clerk, it is in no case liable for more than a part of the expenses of the registration officer. Sect. 15 of the Act of 1918 which deals with the expenses of registration, provides by sub-s. 1 that any expenses properly incurred by the registration officer shall be paid by the council whose clerk he is, subject, in cases where the registration area and the borough are not coterminous, to such contribution by the council of any other borough as the Local Government Board (now the Home Secretary) may direct; and by sub-s. 4, that there shall be paid by Parliament to the council of the borough one-half of the amount so paid by the council. It is clear that under these provisions the borough council can never bear more than half, and in some cases will bear less than half, the expenses of the registration officer who acts for it. As the Act only renders the borough council liable for part of the expenses of the registration officer, it would not be equitable to require the council to make him a superannuation allowance which was based upon the whole of these expenses. As the post of registration officer did not exist when the Act of 1866 was passed, that Act does not empower the borough council to grant a superannuation allowance to the holder of that post as such. That post was created by the Act of 1918, but that Act does not appear to provide

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either expressly or by implication that a superannuation allowance to the registration officer may be paid by the borough council or charged upon the borough fund, and the presumption thus arises that the Legislature did not intend that there should be any allowance of that kind. That presumption is rendered stronger than it would otherwise be by the fact that the Act expressly provides by s. 15 for the payment of the expenses of the registration officer, and by s. 18 for the payment of compensation to an officer who suffers loss in consequence of the Act.

There are few cases dealing with superannuation allowances to officers on retirement, but in *Lawson* v. *Marlborough Guardians* (1) it was held that a district medical officer who was also a public vaccinator appointed by a board of guardians was not entitled to bring in his fees for vaccination as part of the " salary and emoluments " upon which his superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, was to be calculated. The corporation cases cited on behalf of the appellant and some other cases of the same kind are distinguishable from the present case. These cases were all cases of compensation to the holder of an office on its abolition by statute, and were not cases like the present of superannuation allowance to the holder of an office on his retirement. These cases show that where the holder of an office is forcibly deprived of it by statute he is entitled to compensation for the full measure of all that he is losing, both his official salary and all incidental fees ; but they are no authority for saying that where the holder of the office is retiring from it through age or infirmity his superannuation allowance is to be based not only upon his salary and payments connected with it, but also upon all his incidental fees and perquisites. Further, in each of these cases in which compensation was paid to a town clerk in respect of fees or profits from some post other than that of his office as town clerk, that post was one which was under the same corporation whose clerk he was, and not, as here, under a different authority. Moreover, the older of these cases arose

(1) [1912] 2 Ch. 154.

under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 66, of which provides that the town clerk is to have adequate compensation for the salary of his office, regard being had " to all other circumstances of the case," an expression wide enough to cover his remuneration from any other post which he happened to fill. Even in these cases of compensation for deprivation of office, it seems that account should only be taken of the officer's official salary, and of payments made to him in respect of employment under the patronage of the corporation which pays his salary and from the same fund out of which his salary is paid: see per Denman C.J. in *Reg.* v. *Poole Corporation* (1); in *Reg.* v. *Carmarthen Corporation* (2); in *Reg.* v. *Manchester Corporation* (3); and in the last-mentioned case when again before the Court. (4)

Montgomery K.C. replied.

LORD HEWART C.J. This is a special case stated by the Minister of Health for the opinion of this Court under s. 2, sub-s. 1, of the Audit (Local Authorities) Act, 1927. The question is: Whether the Council of the metropolitan borough of Stoke Newington had power, when they were granting a superannuation allowance to their town clerk Dr. White under the Superannuation (Metropolis) Act, 1866 (5), to take into account the fees received by him as registration officer under the Representation of the People Acts.

It is not necessary to repeat all the facts, which are clearly set out in the case stated. It is enough to say that the Council, in their accounts for the financial year ended March 31 of last year, entered and charged a sum of 414*l*. in respect of the superannuation allowance awarded by them to Dr. White, upon his retirement from the office of town clerk at the end of January, 1927. In computing that sum of 414*l*. the Council had taken into account, amongst other things, the fees received by Dr. White as registration officer under the Representation of the People Act, 1918 (1), for the borough of Stoke Newington, the portion of that total sum which was calculated upon the basis of these fees being 43*l.* 2*s.* 6*d.* The assistant district auditor, by certificate dated November 6, 1928, disallowed that sum of 43*l.* 2*s.* 6*d.* for the reason that in his view the fees received by Dr. White as registration officer were not pensionable emoluments of his office of town clerk within s. 4 of the Act of 1866 (2), and he surcharged the sum of 43*l.* 2*s.* 6*d.* upon the then mayor of the borough. The case recites, and indeed the fact undoubtedly is, that the town clerk of this borough is not merely in fact, but necessarily, the registration officer for the borough by virtue of s. 12 of the Representation of the People Act, 1918. (1) [His Lordship read sub-s. 2 of that section.] The case of Stoke Newington is the kind of case which is referred to in the second limb of that sub-section. The case further finds that the expenses of registration, including the remuneration of the registration officer, are in the first instance paid by the borough council as general expenses of the council, but a refund of one-half is afterwards made to the council by the Treasury. The sum of 43*l.* 2*s.* 6*d.* having been disallowed, and surcharged, the then mayor of the borough appealed to the Minister of Health, and requested the Minister to state in the form of a special case for the opinion of this Court the questions of law arising upon his appeal. It is in those circumstances that this case is stated.

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(1) (1838) 7 A. & E. 730.

(2) (1839) 11 A. & E. 9, 15.

(3) (1843) 5 Q. B. 402, 407.

(4) (1846) 9 Q. B. 458, 466.

(5) See note (1) ante, p. 223.

The contention which was, and is, offered on behalf of the appellant in answer to the certificate of disallowance is that inasmuch as the late town clerk to whom the superannuation allowance was awarded was by virtue of s. 12, sub-s. 2, and s. 16, sub-s. 2, of the Representation of the People Act, 1918 (3), necessarily the registration officer for the parliamentary borough of Stoke Newington, the salary or payments received by him for acting as registration officer were emoluments of his office as town clerk within the meaning of s. 4 of the Superannuation (Metropolis) Act, 1866, and were, therefore, properly included for the computation of the allowance.

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(1) See note (1) ante, p. 224. (2) See note (1) ante, p. 223.

(3) See note (1) ante, pp. 224, 225.

The important words of s. 4 of the Act of 1866 are as follows: "Subject to the provisions herein contained, the allowance to be granted . . . . to persons who shall have served in an established capacity as officers as aforesaid . . . . shall be as follows; (that is to say), To any person who shall have served ten years and upwards and under eleven years, an annual allowance of ten-sixtieths of the salary and emoluments of his office; and in like manner an addition of one-sixtieth in respect of each additional year of such service . . . ."

It is not suggested that the payments by way of remuneration which came to the hands of Dr. White as registration officer were part of his salary as holder of the office of town clerk. The contention is that they constitute a part of the emoluments of that office, and the question which we have to decide is whether the expression "emoluments of his office" in the Act of 1866 is sufficiently wide to cover for the purposes of that Act the fees which he received as registration officer.

The Court has heard an elaborate and extremely able argument based upon the difference which it is said exists between compensation and superannuation; and indeed the two things are obviously not the same. It is said that, when a question of compensation arises by reason of the abolition of the office which a man has held, he is to be compensated for everything, whatever it may have been, that he received in the way of profit or advantage by reason of his having held that office; but that where the question is one of superannuation other considerations apply, and the pension which is payable by a particular body to an officer or former officer of that body in respect of his office is to be calculated solely by reference to the services rendered by him to that particular body. It is urged further that the argument derives force from the words of s. 1 of the Act of 1866. Those words provide that certain bodies may at their discretion grant to any officer in their respective services upon superannuation, "an annual allowance not exceeding in any case two-thirds of his then salary, regard being had to the scale of allowances hereinafter contained, and shall charge

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such allowance to the fund or funds to which such salary would have been charged if he had continued in his office." The argument, if it is expanded, comes to this, that inasmuch as the superannuation allowance is charged to the fund from which the salary came, it is not right that for purposes of the allowance that fund should be debited with a payment calculated upon fees received from some extraneous or collateral appointment. That argument has, no doubt, at first blush a certain attractiveness, and in fact there was a time when I was much impressed by it. Upon reflection, however, I find a great difficulty in putting, even in different sets of circumstances, two different meanings upon the same expression "emoluments of his office." What is the reason why the expression "emoluments of his office" must be taken to mean one thing for the purpose of compensation when an office is abolished, and a different and more limited thing for the purpose of superannuation when by reason of infirmity or old age, although the office continues, the person to be superannuated ceases to hold that office? I confess that I fail to follow the distinction. The point is not, with great respect, whether payment by way of compensation is the same thing as payment by way of superannuation allowance. The point is, why should the identical phrase "emoluments of his office" receive an ampler and more generous interpretation in the one case and a more limited or more restricted interpretation in the other? The preposition "of" remains, and the emolument in each of the two cases is equally an emolument of his office.

Our attention has been directed to a great number of cases, though I do not say they have been one too many, in regard to the question which is before the Court. But when all allowance has been made for difference of circumstances in the particular cases and difference of phrase employed in the particular Acts, I cannot find anywhere in these cases anything which compels us to restrict the meaning of the expression "emoluments of his office" because the topic is superannuation, in a way in which the expression would not be restricted if the topic were compensation. After all, a man is no more acting voluntarily when he ceases to hold his office by reason of infirmity or old age than when he ceases to hold office by reason of the abolition of the office; and it does not seem to me that any useful contrast can be pointed between the two classes of case for the purpose, at any rate, of showing that the phrase in question may have different meanings. In this particular case it was no mere accident nor was it the grace or volition of anybody which brought it about that Dr. White, as town clerk, also became registration officer for the borough. The Act of Parliament of 1918 compelled him to occupy both offices by producing the state of affairs in which it was no more possible that a man could be registration officer in that borough without being town clerk, than that a man could be town clerk in that borough without being registration officer. The appointment as registration officer was by the Act annexed to the office of town clerk. The duties of the registration officer became of necessity, by the force of the Act, added to the previously existing duties of the town clerk, so far indeed as he had not already performed them under another name in the phase of the registration law preceding the passing of that Act. In other words, upon the obvious construction of that statute the appointment as registration officer became of necessity appurtenant to the office of town clerk.

That being so, it seems to me that the kind of reasoning which prevailed in such cases as *Rex* v. *Bridgewater Corporation* (1); *Reg.* v. *Norwich Corporation* (*No.* 2) (2); *Reg.* v. *Poor Law Board* (3); and *Drew* v. *Metropolitan Board of Works* (4) applies in the present case. I should like to read two short passages from one of these cases only, though many passages in these cases seem to me to bear upon the question which we have to decide. In *Drew* v. *Metropolitan Board of Works* (4) Cotton L.J. said this: "There are a good many items in respect of which compensation was claimed, and as regards two there was no dispute—namely, the salary which he

(1) 6 Ad. & E. 339.
(2) 3 Q. B. 285.
(3) L. R. 6 Q. B. 785.
(4) 50 L. T. 138.

received as clerk and certain fees which he received in consequence of certain duties he was bound to perform, under an Act of Parliament passed in 1803, either in registering deeds or in registering transfers." (1) That case seems to have been curiously like the present case in essential particulars. A little later the Lord Justice added this: "The compensation clause with which we are dealing, which is not a clause introduced into the Act of 1803, but into the Act of 1877 when there was a clerk having an actual engagement with the bridge company, and what that Act of Parliament refers to is the person then holding a particular office, and he is to have compensation for 'salary and emoluments' actually received by him during two years. What we must look to is not whether some of the things done by him would naturally be incident to his office as constituted under the Act of 1803 or intended to be provided for by that Act, for which no compensation is to be provided, but there being compensation to be given to the clerk we must see what his position was and what, under the contract express or implied between him and the company, he was receiving by way of salary and emolument, which we can fairly say is attributable to his position as clerk." Applying that kind of reasoning to the present case I think that once it clearly appears that in such a case as this the town clerk as such must be registration officer, and that the registration officer must be town clerk, it is fair and right to say that the fees which he receives under the name of his appointment as registration officer are a part of his total emoluments as town clerk.

In my opinion, therefore, this disallowance and this surcharge were wrong, and the answer to the question which is submitted to us ought to be in the affirmative, that is to say, that the council had power when they were granting a superannuation allowance to their town clerk under the statute of 1866 to take into account the fees received by the town clerk as registration officer under the Representation of the People Acts.

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(1) 50 L. T. 140.

AVORY J. I also am of opinion that the answer to the question submitted to the Court should be that the council had power when granting a superannuation allowance to the appellant as their town clerk under the Superannuation (Metropolis) Act, 1866, to take into account the fees received by him as registration officer under the Representation of the People Acts, and that therefore the sum of 43*l.* 2*s.* 6*d.* was, in the circumstances, improperly disallowed and surcharged by the auditor. Unless the cases which have been cited to us can be distinguished from the present case on the ground on which Mr. Stafford Cripps has sought to distinguish them, I think that the expressions used in these cases are conclusive in favour of the contention here put forward on behalf of the appellant that that sum was wrongly surcharged. The ground on which he sought to distinguish these cases was that most of them are decisions under a statute which awarded compensation to an officer who had been deprived of his office, whereas the present case arises under a statute which is awarding, not compensation to an officer deprived of his office but a pension or superannuation allowance to a person who has ceased to hold his office. He said that in the case where the statute is awarding compensation it must be assumed that the applicant is to be compensated for everything which he has lost, but that in the case of a statute which provides for superannuation the allowance is to be based only upon the salary which he receives from his main official employment. I am unable to appreciate the distinction thus sought to be drawn between the one class of statute and the other. The only difference between a statute which awards compensation, and a statute like that here in question which awards a superannuation allowance is that under a statute of the latter kind the officer is compensated to a certain extent only for all that he has lost, being entitled to a proportion of the whole, which in this case is never to exceed two-thirds of his salary. I can see no difference in principle between the two classes of statute, and I therefore think that the cases which have been cited are applicable here.

In addition to the passage which my Lord has cited from the judgment of Cotton L.J. in *Drew* v. *Metropolitan Board of Works* (1) there is a passage in the judgment of Coleridge J. in *Rex* v. *Bridgewater Corporation* (2), which appears to me to be directly in point here, although it is true that that case arose under a statute which was awarding compensation. Speaking of the applicant in the case before him Coleridge J. said: "Suppose Trevor had never taken the new office, would he not have had compensation? No doubt he would. Then what would have been the measure of the compensation? He would have said, 'I was common clerk, and did the duties of that office; and, as such clerk, by the usage of the borough, I did other duties, for which I received fees.' He would then have had compensation for all." (3) In the somewhat similar case of *Reg.* v. *Norwich Corporation* (*No.* 1) (4), where in assessing the compensation to be paid to the steward of a borough there was a claim to take into account a sum received by the steward for holding a corporation court, which sum was paid by the sheriffs and not out of the borough fund, Denman C.J., in giving judgment, said: "As to the sheriffs' court it was a court of the corporation; and, if the payments in respect of it were an emolument fairly attached to this corporate office, it was a proper subject of compensation." (5) In the case of *Reg.* v. *Poor Law Board* (6), where the question was whether the clerk to the guardians of a union, who was also an attorney, was entitled in making his claim for compensation to take into account the profits made by him from legal work which he had done in conducting proceedings under the Lands Clauses Act, Blackburn J. said: "Then arises the question whether the Poor Law Board, in assessing compensation, are tied down to those things which are strictly legally attached to the office; or whether they may say that the office is worth so much more because of the goodwill annexed to it" (7), and

(1) 50 L. T. 138, 140.
(2) 6 A. & E. 339.
(3) Ibid. 348.
(4) 8 A. & E. 633.
(5) Ibid. 637.
(6) L. R. 6 Q. B. 785.
(7) L. R. 6 Q. B. 789.

Montague Smith J., at the end of his judgment, said: "It" —that is to say the goodwill under which he did this extra work—"was incident not to Mr. Baylis' office as an attorney, but to his office as an attorney and clerk to the guardians" (1), and therefore it was held that the profits of the legal work could be taken into account.

Those, it is true, are all cases where the Court was dealing with a statute awarding compensation for deprivation of office; but one case has been cited to us, which is a determination of the question under an Act awarding a pension or superannuation allowance—namely, the Asylums Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48). The case to which I refer is *Rex* v. *Lyon. Ex parte Harrison* (2), where the short facts were that the London County Council maintain a number of asylums, that during the war many of the officers employed in those asylums undertook military service so that the asylums had to be carried on with depleted staffs, that the council called upon the remaining officers to undertake special duties or extra work outside the duties of their contracts, and in consideration of the special services rendered, approved of special duty grants to those officers. It was held that those special duty grants were emoluments within the Act of Parliament of the offices held by those who received them.

It seems to me that it matters not whether on the one hand the extra duties which are performed, and for which some extra payment is received, arise from the particular contract between the employer and the employee or the particular usage of the employer's business, or whether on the other hand those extra duties are attached to the office by virtue of a statute, as in this case. In fact if they attach by virtue of a statute a fortiori they are duties which must be performed and the fees which are received as a reward for performing them are strictly within the meaning of the words "emoluments of the office."

For these reasons I agree that the question should be answered in the way which my Lord has indicated.

(1) L. R. 6 Q. B. 790.

(2) [1921] 1 K. B. 203.

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BRANSON J. I agree that the appellant should succeed. Speaking for myself, I am not sure that much help is obtained from cases decided upon other statutes, the language of which though similar to, is not the same as that of the Superannuation (Metropolis) Act, 1866, on which this case depends, and upon their relation to circumstances which are not those of this case. The appellant held the office of town clerk of a metropolitan borough, and the question here is whether the remuneration received by him under the Representation of the People Act, 1918, for acting as registration officer, comes within the expression "salary and emoluments of his office," in s. 4 of the Act of 1866. There is no doubt that it is an emolument. The dispute is whether it is or is not an emolument "of his office." The answer to the question to my mind depends entirely upon the effect of the Representation of the People Act. If that Act properly read created a new independent office, so that it could be said that the appellant held two independent offices, and the fact that he held them both in his own person was but accidental, then I should think that the remuneration for registration work would not fall within these words of the Superannuation Act. In my view, however, the true effect of the Representation of the People Act is merely to add to the duties of a town clerk in areas affected by s. 12, sub-s. 2, the duties of registration officer. The true position is not that a new office has been created, but simply that the duties and, with the duties, the emoluments of the office of town clerk have been increased by that Act.

For these reasons I agree with the judgment that is proposed.

Appeal allowed with costs.
Leave to appeal refused.

Solicitor for appellant: *Emrys Evans, town clerk, Stoke Newington.*

Solicitors for respondent: *Sharpe, Pritchard & Co.*

J. R.

MORRISS *v.* WINTER AND ANOTHER.

[1928. M. 2229.]

1929
July 29, 30, 31.

False Imprisonment—Conviction—Sentence of Imprisonment—Earning of Remission of Portion of Imprisonment—Right of Prisoner to earlier Discharge—Forfeiture of Remission Marks—Detention of Prisoner for One Day in consequence—Action against Governors of Prisons—Prison Act, 1898 (61 *&* 62 *Vict. c.* 41), *s.* 8—*Prison Rules,* 1899 (*St. R. & O.*, 1899, *No.* 322), *r.* 36—*Prison Rules,* 1907 (*St. R. & O.* 1907, *No.* 617), *r.* 37 (A)—*Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

By the Prison Act, 1898, s. 8: "Provision may be made by prison rules for enabling a prisoner sentenced to imprisonment . . . . to earn by special industry and good conduct a remission of a portion of his imprisonment. . . . ."

By r. 36 of the Prison Rules, 1899, it is provided that ". . . . every prisoner shall, as a condition of becoming eligible for remission, earn the required number of marks. . . . ."

By r. 37 (A) of the Prison Rules, dated August 12, 1907, it is provided that "a convicted prisoner sentenced to imprisonment . . . . for a period exceeding one calendar month, shall be eligible, by special industry and good conduct, to earn a remission of a portion of his imprisonment. . . . ."

M. was convicted in December, 1925, of certain misdemeanours and sentenced to two years' imprisonment with hard labour and twelve months' imprisonment, the sentences to run consecutively. An order was made by the Court directing that he should be detained in prison in conformity with the sentences passed. He was first detained in Portsmouth Prison and afterwards in Pentonville Prison. In December, 1927, after M. had been removed to Pentonville Prison, the Governor of Portsmouth Prison endorsed on M.'s stage card the forfeiture of five remission marks, to make it agree with M.'s record. There was a dispute whether or not the Governor of Portsmouth Prison had ordered the forfeiture of those marks on May 10, 1926, and the jury differed with regard to it. As a result of the forfeiture of those five marks M. was released by the Governor of Pentonville Prison on July 21, 1928, instead of on July 20. On August 2, 1928, M. brought an action against the Governors of both prisons to recover damages for his detention in prison during that one day. The jury found that the Governor of Portsmouth Prison had not acted maliciously nor with intention to injure M. and that he had not made a false statement:—

Held, that the Prison Rules did not confer upon M. any legal right to an earlier discharge by the obtaining of remission marks, and that therefore the action could not succeed against either of the Governors; that having regard to the findings of the jury the action could not succeed against the Governor of Portsmouth Prison; and further that that defendant was protected by the Public Authorities Protection Act, 1893, as the action was not brought within six months of the act that caused the damage, there being no continuance of the injury or damage, as there was no continuance of the act by that defendant which caused the damage; and lastly that the Governor of Pentonville Prison was protected, as he had merely acted in pursuance of the order of the Court.

Freeborn v. *Leeming* [1926] 1 K. B. 160, 170; *Carey* v. *Bermondsey Borough Council* (1903) 67 J. P. 447; and *Henderson* v. *Preston* (1888) 21 Q. B. D. 362 followed.

FURTHER consideration of an action tried before Horridge J. and a special jury.

The plaintiff, Hayley Morriss, on August 2, 1928, commenced an action by which he claimed damages against the defendant, Captain Eugene Winter, the Governor of Portsmouth Prison, and the defendant, Major A. C. H. Benke, the Governor of Pentonville Prison, in respect of his detention by the defendant Benke in Pentonville Prison until July 21, 1928, whereas the plaintiff alleged that he was entitled to be discharged on July 20, 1928.

The facts and arguments sufficiently appear from the judgment.

Comyns Carr K.C. and *Harold Simmons* for the plaintiff.
Sir Boyd Merriman K.C. and *Giveen* for the defendants.

Cur. adv. vult.

July 31. HORRIDGE J. read the following judgment. At the assizes held at Lewes in the month of December, 1925, the plaintiff was convicted of certain misdemeanours and sentences were passed upon him of two years' imprisonment with hard labour and twelve months' imprisonment without hard labour, such sentences to run consecutively, and an order of that Court was duly made directing the keeper of Portsmouth Prison to detain him in conformity with the sentences passed.

It was alleged by the defendants and denied by the plaintiff that the defendant Winter on May 10, 1926, ordered a forfeiture by the plaintiff of five remission marks. The result of such forfeiture, if made, would cause the plaintiff to lose one day of the remission of his sentence which he might otherwise have obtained.

The plaintiff was subsequently removed to Winchester Prison and ultimately to Pentonville Prison. At Pentonville Prison the defendant Benke received the plaintiff's record and also his stage card, the former of which had endorsed on it the alleged forfeiture of five marks, and the latter of which bore no such forfeiture. On the documents being sent to the defendant Winter in December, 1927, he endorsed, or caused to be endorsed, on the stage card the forfeiture of the five marks, making it correspond in this respect with the plaintiff's record. In December, 1927, the plaintiff sent a petition to the Home Secretary complaining of the forfeiture of these remission marks, and on January 9, 1928, the defendant Benke was instructed by the Under Secretary of State for the Home Department to inform the plaintiff that the Home Secretary had considered the petition and had found no reason for taking any action with regard to it.

The defendant Benke, on July 21, 1928, released the plaintiff, instead of releasing him on July 20, 1928, as he would in the ordinary course have done if the forfeiture of the five marks had not taken place, and it is in respect of this detention that the plaintiff now brings his action.

At the trial I left certain questions to the jury, in answer to which the jury were unable to agree whether or not the forfeiture in fact took place on May 10, 1926, but they found that the defendant Winter on that date gave the plaintiff an opportunity of being heard and of making his defence, and that the defendant Winter was not actuated by malice in ordering the forfeiture. As regards the entry made in December, 1927, the jury found that the defendant Winter did not make a false statement, but they stated that this finding did not mean that they decided the question whether or not the forfeiture had taken place on May 10, 1926, and that he did not make the statement maliciously or with the intention to injure the plaintiff. The jury did not answer any of the other questions which I had submitted to them.

The first contention on behalf of the defendants was that the obtaining of remission marks did not give the plaintiff any legal right to an earlier discharge, and that any earlier discharge, if granted, was an act of grace and not a legal obligation, and it therefore becomes necessary to decide which view is correct, as if the view contended for on behalf of the defendants is the right one this action cannot lie against either of the defendants.

Sect. 8 of the Prison Act, 1898, enacts that "provision may be made by prison rules for enabling a prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences for a period prescribed by the rules, to earn by special industry and good conduct a remission of a portion of his imprisonment, and on his discharge his sentence shall be deemed to have expired."

By r. 36 of the Prison Rules made in 1899 in pursuance of the Prison Act, 1898, it is provided that "a daily record of the industry of every prisoner shall be kept in marks, the award of which shall be carefully supervised by the governor and deputy governor, and every prisoner shall, as a condition of becoming eligible for remission, earn the required number of marks, and in addition, any marks he may have forfeited for misconduct."

By r. 37 (A) of the Prison Rules dated August 12, 1907, it is provided that "a convicted prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences, for a period exceeding one calendar month, shall be eligible, by special industry and good conduct, to earn a remission of a portion of his imprisonment, not exceeding one-sixth of the whole sentence."

On admission to the prison a document called the prisoner's record is prepared, on which are at once inserted two dates, one the earliest date on which he can be discharged if he earns full remission marks, and the other the date of expiration of the sentence. During the prisoner's detention he is credited with the full amount of remission marks, unless he has for some reason been deprived of them, and in the ordinary course the date of his discharge depends upon the number of remission marks, and if full remission marks have been earned, one-sixth of his total sentence is remitted.

The argument put forward on behalf of the defendants was that in r. 36 of the Prison Rules, the words are "as a condition of becoming eligible for remission," and in r. 37 (A) the words are "shall be eligible, by special industry and good conduct, to earn a remission of a portion of his imprisonment," and my attention was drawn to r. 35, sub-r. 2, in which the word "entitled" is used when it is intended to confer an absolute right.

For the plaintiff it was urged that the wording in the statute is "to earn by special industry and good conduct a remission of a portion of his imprisonment," and the word "earn" also appears in rr. 36 and 37 (A).

I think the question is a difficult one, but I have come to the conclusion that if it was intended to confer a legal right on prisoners clearer and stronger words than "eligible for remission" would have been used. The statute itself only enacts that rules may be made, and rr. 36 and 37 (A) do not say, as they might have done, that the prisoners shall be entitled to a remission. In my view this action cannot succeed as regards either of the defendants, and there was therefore no question on this point proper to be left to the jury, and they are both entitled to judgment in the action.

Further contentions were, however, raised before me, with which I think I ought to deal, in case my view of the statute and Rules is not the correct one.

As regards the defendant Winter, it was urged that with regard to May 10, 1926, there was no evidence that he did anything in respect of which the plaintiff would have any right of action, having regard to the finding of the jury that he duly heard the plaintiff and did not act maliciously, and in my view this argument is correct.

As regards the endorsement by him on the prisoner's stage card it was said on behalf of the plaintiff that by doing this he in effect caused the defendant Benke to detain the plaintiff, and that therefore there was a case to go to the jury upon a second trial; but in my view the jury having negatived falsehood, malice and intention to injure, there is no form in which any action could possibly succeed against this defendant.

This entry which was complained of was made in December, 1927, and the action was not commenced until August 2, 1928, and on behalf of the defendant Winter it was said that any action in respect of this entry must be barred by the Public Authorities Protection Act, 1893. An endeavour was made to take the case out of the six months' limit by saying it was a case of continuous injury or damage within s. 1 (*a*) of the statute, and that the action was brought within six months next after the ceasing thereof. Mr. Comyns Carr said that by the act an injury was inflicted on the plaintiff and continued until the damage was actually occasioned. In *Freeborn* v. *Leeming* (1) it was held that the right view to put on the words of the statute as to continuance of the injury or damage was that expressed in *Carey* v. *Bermondsey Borough Council* (2) by Lord Halsbury L.C. when sitting in the Court of Appeal, that " continuance of the injury or damage " means the continuance of the act which caused the damage. In this case there was no continuance of the act by the defendant Winter. The act was the making of the entry in December, 1927, once and for all, and in my view the statute provides protection to the defendant Winter, and he is entitled to judgment on this ground as well as on the grounds I have already mentioned. The case of *Turley* v. *Daw* (3) seems to me to be a direct decision of Bray J. in a similar case to the one I have to deal with, and to be one in which he, following the case in the Court of Appeal referred to by me, came to the same conclusion as I am doing.

The remaining point to be dealt with is one on behalf of the defendant Benke, that inasmuch as he merely acted in pursuance of the order of the Court, he is protected from any action. In this case the facts were that he had the order of the Court directing him to hold the plaintiff for the full term of his sentence, he also had the plaintiff's record, which he had verified by having the stage card corrected, which

(1) [1926] 1 K. B. 160, 170.
(2) 67 J. P. 447.
(3) (1906) 94 L. T. 216.

showed that the plaintiff ought to be released on July 21, 1928. I think this case comes within the decision in *Henderson* v. *Preston* (1), and for the reasons stated in that judgment the defendant Benke is protected and no action can lie against him.

There must be judgment for both defendants with costs, but not to include the costs of the separate issue whether or not the marks were in fact forfeited on May 10, 1926.

Judgment for defendants.

Solicitors for plaintiff: *Percy Bono & Griffith.*
Solicitor for defendants: *Treasury Solicitor.*

R. F. S.

FRY (INSPECTOR OF TAXES) *v.* BURMA CORPORATION, LIMITED.

C. A.
1929
June 10, 11, 12, 24.

Revenue—Income Tax—Company established Abroad—Transfer of Control and Registered Office to United Kingdom—Setting up and commencing Trade within Year of Assessment—New Trade—Question of Fact for Commissioners—Profits of Trade of Company before becoming taxable brought into Computation for Purpose of ascertaining Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rule applicable to Case I., Rules applicable to Cases I. and II., r.* 1, *sub-r.* 2.

A company was incorporated in 1919 under the Indian Companies Act, 1913, having its registered office in Rangoon. Owing to the fact that the majority of the shares in the company were held in the United Kingdom and that it was difficult to constitute a permanent board in Rangoon, the company, by resolutions passed in December, 1924, and confirmed in January, 1925, resolved to transfer the control of the company and its registered office to London. It was agreed that from July 1, 1925, the company became resident in the United Kingdom and assessable to income tax under Case I. of Sch. D of the Income Tax Act, 1918. An assessment for the year ending April 5, 1926, having been made on the company based on an estimate of the profits of the business from July 1, 1925, to April 5, 1926, under r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D, the company appealed to the Commissioners. The Commissioners found that the trade of the company was not set up and commenced within the year of assessment, as the company carried on the same trade or concern in the nature of a trade as it had carried on since its incorporation in 1919, and therefore that the assessment on the company for the year ending April 5, 1926, must be made in accordance with the Rule applicable to Case I. of Sch. D on the full value of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924, that being the date in the year immediately preceding the year of assessment on which the accounts of the company were usually made up. Rowlatt J. reversed the decision of the Commissioners.

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(1) 21 Q. B. D. 362.

On appeal:—

Held, that the question whether or not the trade had been set up and commenced within the year of assessment within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D was a pure question of fact to be determined by the Commissioners, and that the Commissioners having found that the trade had not been set up and commenced within the year of assessment, they were right in holding that the assessment must be made in accordance with the Rule applicable to Case I.

Held, also, that although the profits made in the three years preceding the year of assessment had not been taxed and were not taxable, they could be used as a measure for the computation of the amount of the tax for the year of assessment on the basis of the three years' average provided for by the Rule applicable to Case I., which did not exclude profits of a trade carried on exclusively abroad.

Singer v. *Williams* [1921] 1 A. C. 41 discussed and applied.

APPEAL from a decision of Rowlatt J. on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

1. At a meeting of the above Commissioners held on February 10, 1926, for the purpose of hearing appeals the Burma Corporation, Ld. (hereinafter called "the company"), appealed against an assessment to income tax under Case I. of Sch. D in respect of the profits of the company's business in the sum of 1,500,000*l*. for the year ending April 5, 1926, made upon the company under the provisions of the Income Tax Acts.

2. The company was incorporated under the Indian Companies Act, 1913, on December 17, 1919. Its registered office was situate in Rangoon. Its London office was at 1 London Wall Buildings, E.C. 2.

The issued share capital of the company consisted of 135,416,890 rupees, divided into shares of 10 rupees each. Nearly all the issued capital was held in the United Kingdom.

3. The principal object of the company was to acquire and carry on certain lead, silver and zinc mines situate in Burma,

which had been carried on previously by an English company, the Burma Mines, Ld.

4. From the incorporation of the company until July, 1925, the business of the company was controlled by a board of directors (six in number) in Burma. The directors' meetings and the annual general meetings of the company were held in Rangoon. The accounts of the company were prepared and audited in Burma. Of the six directors of the company five were resident in Burma.

5. Having regard to the fact that the great majority of the shares of the company were held in the United Kingdom and to the difficulty of constituting a board of any permanence in Rangoon it was decided that the control of the company's business should be transferred to London. This decision was carried into effect by increasing the number of the directors to a maximum of twelve, and by enabling the directors to hold their board meetings elsewhere than in India. The necessary alterations in the articles of association of the company were effected by resolutions passed and confirmed on December 18, 1924, and January 3, 1925, respectively. Six new directors all of whom were resident in England were appointed, making the total number of directors of the company eleven, seven of whom were resident in England.

6. By a memorandum in writing dated July 1, 1925, and signed by a majority of the directors of the company (as required by the amended article of association No. 106) it was determined that the meetings of the board should thenceforth be held in London.

The directors of the company resident in Rangoon (four in number) constituted a local committee of the board to deal with the company's affairs in Burma under the general directions of the London board.

7. It was agreed that since July 1, 1925, the company became resident and assessable to income tax under Case I. of Sch. D of the Income Tax Act, 1918.

8. The Commissioners stated that they were satisfied upon the evidence called before them that the removal of the control of the company from Burma to London in 1925

did not cause, and was not intended to cause, any alteration in the carrying on or working of the company's undertaking.

The company had continued to work and develop the same mine on similar lines as theretofore, winning therefrom similar products (lead, silver and zinc) and disposing of them in the same markets.

The company was selling silver to the Indian banks under running contracts which were entered into by the company before July, 1925.

9. The assessment under appeal was made upon the company on an estimate of the company's profits for the period from July 1, 1925, to April 5, 1926, and purported to be made in accordance with r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918. Previous to this assessment no assessment had been made on the company in respect of the profits of its business.

10. It was contended on behalf of the company:—

(*a*) that the trade of the company was not set up or commenced within the year of assessment.

(*b*) that the company during the year of assessment was carrying on the same trade or concern in the nature of a trade as it had carried on since its incorporation in 1919.

(*c*) that the company was assessable under Case I. of Sch. D of the Income Tax Act, 1918, and that the assessment should be computed in accordance with the Rule applicable to Case I. of Sch. D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924.

11. It was contended on behalf of the appellant (inter alia):—

(*a*) that the assessment under appeal fell to be made in accordance with r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D.

(*b*) that the assessment having been so made was correct in principle and should be confirmed.

12. Having considered the evidence and arguments adduced before them the Commissioners decided as follows:—

"1. In July 1925 the control of the appellant company was shifted from Burma to the United Kingdom, and consequently the company became assessable to income tax under Case I. of Sch. D as a company residing in the United Kingdom, in respect of the whole of the profits arising from the company's trade.

"2. Under these circumstances the Crown contend that the trade of the company which became assessable under Case I. of Sch. D. is 'a trade which has been set up and commenced within the year of assessment' (r. 1, sub-r. 2, of Cases I. and II.).

"3. Upon the evidence before us we hold that the trade was not set up and commenced within the year of assessment. The company carried on the same trade or 'concern in the nature of a trade' as they have carried on since incorporation in 1919.

"4. We hold that the assessment on the company for the year ending April 5, 1926, must be made in accordance with the Rule applicable to Case I. of Sch. D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924.

"5. If, however, a part of the profits of the appellant company for 1925–26 has been treated as income from foreign or colonial possessions or securities for the purpose of taxation in the hands of its shareholders or debenture holders, the assessment under Case I. will require to be adjusted proportionately in order to avoid double taxation."

13. The appellant (the inspector of taxes) immediately after the determination of the appeal declared to the Commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149, which Case the Commissioners stated and signed accordingly.

14. The Commissioners stated in the Case that having regard to the remarks of Rowlatt J. in *Maclaine & Co.* v.

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Eccott (1) they had considered it desirable to state the Case on a question of principle only in order to avoid the delay occasioned by waiting for an agreement of the figures of assessment in accordance with their decision set out in para. 12 of the Case. When the High Court had decided the question of principle in dispute, the Case would require to be remitted to the Special Commissioners in order that the assessment might be adjusted in accordance with the judgment of the Court.

Rowlatt J. reversed the decision of the Commissioners and held that the removal to London of the seat of control of the company's trade operated as the setting up and commencement of a trade, and, accordingly, that the assessment of the company fell to be made in accordance with r. 1, sub-r. 2, of the Rules applicable to Cases I. and II.

The company appealed. The appeal was heard on June 10, 11 and 12, 1929.

Latter K.C., *Raymond Needham K.C.* and *Ian Baillieu* for the company. The question is whether the trade now carried on by the company is the same trade as that carried on by it in Burma. On that point the Commissioners have decided in the company's favour, and the question being one of fact their decision ought not to be interfered with by the Court. The trade continued the same as it did before the seat of control of the company's trade was transferred to this country on July 1, 1925. That being so Case I. of Sch. D. exactly fits the present case. The trade, therefore, not having been set up within the year of assessment within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., the company ought to be assessed on the basis of a three years' average of profits, as provided by the Rule applicable to Case I.: *Singer* v. *Williams*. (2)

Bradbury v. *English Sewing Cotton Co.* (3), when carefully looked at, is really in favour of the company; certainly not against it. That decision in no way interfered with the proposition laid down in *Singer* v. *Williams* (2), which in

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(1) (1924) 10 Tax Cas. 481, 550. (2) [1921] 1 A. C. 41.
(3) [1923] A. C. 744.

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fact was quoted by Lord Cave with approval—namely, that the fact that the income of a previous year is not taxable does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year. That case is no authority for the proposition that because a trade has been carried on exclusively abroad previously to its becoming taxable in this country the profits made abroad cannot be used as a measure for computing the three years' average. See also *Stevens* v. *Boustead & Co.* (1)

On the question of different categories of income overlapping one another there is a considerable amount of authority. In *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2) it was held that the Crown had an option as to the category under which it would tax provided that in exercising it no double taxation was involved.

Ormond Investment Co. v. *Betts* (3) deals with the question of how a company ought to be assessed for the first year on its foreign possessions.

There is no ground for saying that because the company was out of the Kingdom in the year before the transfer of the seat of control of the trade the trade was not the same trade.

To succeed the Crown must show that the company's trade is a new trade. A trade is not discontinued because the seat of control is transferred from one place to another. Even if it were held that the profits of the three years' trading abroad could not be used as a measure for arriving at the amount of tax payable in the year of assessment and therefore that the Rule applicable to Case I. could not apply, that would not bring the case within r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. so as to render the tax payable on the amount of the profits of the year of assessment.

Sir Boyd Merriman K.C. and *R. P. Hills* for the Crown. The sole question on this appeal is what is the meaning of the word "trade" in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. It is submitted that its meaning is "income tax trade" and not "physical trade."

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(1) [1918] 1 K. B. 382.

(2) [1912] 2 K. B. 41.

(3) [1928] A. C. 143, 158.

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The question depends on the two following propositions:

1. Under Case I. income tax is only payable in respect of a trade carried on in the United Kingdom. There can be no taxation under that Case in respect of a trade carried on outside the United Kingdom.

2. Income in order to be used as a measure to compute the amount of tax must have fallen to be taxed under the same Schedule and the same Case as the income which is sought to be charged, and, with certain exceptions, must belong to the same persons: *Bradbury* v. *English Sewing Cotton Co.* (1)

In *Colquhoun* v. *Brooks* (2) it was held that Case I. was not intended to apply to a trade carried on exclusively abroad by a person resident in the United Kingdom, and that only so much of the profits as were received by him in this country were liable to tax.

There is an essential difference between a trade which is exercised wholly outside the United Kingdom and one that is not. If it is exercised wholly outside the United Kingdom it is not for revenue purposes a trade but a foreign possession. It is vital to consider what is the past history of the trade. Income which was not in respect of a trade carried on in the United Kingdom but in respect of a foreign trade cannot be used as a measure for assessing the income of a trade carried on in the United Kingdom.

[LAWRENCE L.J. The question here is whether the company having removed its seat of control over here has established a new trade. Past profits have nothing to do with the matter.]

The whole question comes back to this, whether the trade for the three years in Rangoon is the physical trade or the income tax trade. It is submitted that a trade exercised wholly outside the United Kingdom is the physical trade and not the income tax trade, which must be that exercised in the United Kingdom.

[LORD HANWORTH M.R. It is not the trade that is taxed but the taxpayer who is taxed in respect of the trade.]

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(1) [1923] A. C. 744.

(2) (1889) 14 App. Cas. 493.

In the Rule applicable to Case I., which provides for the computation of a three years' average, reference is made to the "said trade," and it is submitted that the profits of a new trade cannot properly be described as the profits of the "said trade."

A trade exercised wholly outside the United Kingdom has no existence for revenue purposes, but immediately it ceases to be exercised wholly outside the United Kingdom and is exercised wholly or partially in the United Kingdom it is caught by Case I., and that altogether apart from the residence of the owner.

The partial exercise of a trade in this country renders the whole trade a Case I. trade: *San Paulo (Brazilian) Ry. Co.* v. *Carter.* (1)

Residence by itself is not a test of taxability. The test is the seat of the brain and control: *Mitchell* v. *Egyptian Hotels, Ld.* (2) It follows therefore that where the first institution of control in the United Kingdom converts a trade formerly wholly exercised outside the United Kingdom into a trade exercised within the United Kingdom, that must, within the meaning of the Income Tax Act, be the setting up of a new trade. The *Egyptian Hotels* case (2) was exactly the converse of the present case. It was there held that the transference abroad of the seat of control of the company abolished the Case I. trade.

[LORD HANWORTH M.R. referred to *Ryhope Coal Co.* v. *Foyer* (3), where Grove J. dealt with the meaning of setting up a new business.]

The Crown rely on the judgments of Lord Shaw and Lord Phillimore in *Bradbury's* case. (4)

You cannot, it is submitted, treat profits which have already been defined and taxed as income from foreign possessions as trading profits for the purpose of measuring the amount of tax in the year of assessment, that is to say, you cannot take into account income derived from foreign sources for the purpose of measuring the tax payable on profits arising from home sources.

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(1) [1896] A. C. 31.

(2) [1915] A. C. 1022; [1914] 3 K. B. 118.

(3) (1881) 7 Q. B. D. 485, 494.

(4) [1923] A. C. 744.

As *Bradbury's* case (1) prevents the three years' profits from trading exclusively abroad from being used as a measure for the tax payable in the year of assessment the Rule applicable to Case I. cannot apply, and the case falls within r. 1, sub-r. 2, of the Rules applicable to Cases I. and II.

Latter K.C. in reply referred to *Inland Revenue Commissioners* v. *Trustees of William Drysdale* (2); *Ogilvie* v. *Kitton* (3); *B. W. Noble, Ld.* v. *Mitchell* (4); *Foulsham* v. *Pickles.* (5)

Cur. adv. vult.

June 24. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal by the Burma Corporation, Ld., from a judgment given by Rowlatt J. on January 24, 1929, reversing the decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts which raise the point to be decided are as follows.

The company was incorporated under the Indian Companies Act, 1913, on December 17, 1919, and the registered office of the company is situate at Rangoon. The company has a London office, and nearly all the issued share capital is held in the United Kingdom. The principal object of the company was to acquire and carry on certain lead, silver and zinc mines in Burma, which had previously been carried on by an English company—the Burma Mines, Ld.

From the incorporation of the company until July, 1925, the business of the company was controlled by a board of directors, six in number, in Burma; and directors' meetings, and the annual general meetings of the company were held in Rangoon. Of the six directors of the company, five were resident in Burma.

At the end of 1924 it was decided to transfer the seat and control of the company's business to London; and by special resolutions passed on December 18, 1924, and confirmed on January 3, 1925, effect was given to this decision. New directors were appointed, providing a majority who were resident in England, and by a memorandum in writing dated July 1, 1925, signed by a majority of directors, as required by the amended article 106, it was determined that the meetings of the board should thenceforth be held in London.

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(1) [1923] A. C. 744.

(2) (1928) 13 Tax Cas. 565.

(3) (1908) 5 Tax Cas. 338, 346.

(4) (1927) 11 Tax Cas. 372.

(5) [1925] A. C. 458, 468.

It is not questioned that the effect of these changes was to make the company assessable to income tax under Sch. D, para. 1 (*a*) (ii.), in respect of its annual profits accruing to it, as a company residing in the United Kingdom, and carrying on a trade " whether the same be respectively carried on in the United Kingdom or elsewhere," nor that the tax was to be charged under Case I. An assessment was accordingly made upon the company for the year ending April 5, 1926, and the question to be decided is whether the method of assessment adopted for that year is correct or not.

The Commissioners state that they were satisfied that the removal of the control of the company from Burma to London did not cause, and was not intended to cause, any alteration in the carrying on or working of the company's undertaking; and upon the evidence before them they hold, as a fact, that the trade was not set up and commenced within the year of assessment. " The company carry on the same trade, or concern in the nature of a trade as they have carried on since incorporation in 1919."

No question of figures arises. The question to be determined is one of principle, whether or not the Commissioners are right in their decision that the assessment on the company must be made in accordance with the Rule applicable to Case I. of Sch. D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924, being the date in the year immediately preceding the year of assessment on which the accounts of the company were usually made up.

Upon the facts thus stated, it would seem plain that the Commissioners adopted a right method and measure of assessment. Admittedly the company is to be charged in respect of its annual profits or gains to income tax under Sch. D, for it is within the terms of Sch. D, para. 1 (*a*) (ii.), already quoted. By Sch. D, para. 2, tax under that schedule is to be charged under Case I.; for that is the case which applies in respect of any trade not contained in any other schedule. This trade is not one, such as are quarries or mines, which do fall to be taxed under another schedule—Sch. A. Then by the Rule applicable to Case I.: "The tax shall extend to every trade carried on in the United Kingdom, or elsewhere, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years," ending at the date already given. It would seem unnecessary to go further, for the above Case and rules afford guidance which fits the present facts.

The argument of the Crown, however, is that the rules so far referred to do not govern this case. It is claimed that the company came within the liability imposed by the Income Tax Act on July 1, 1925, and not earlier, and that for income tax purposes it was a new entity with a new trade; that you cannot measure the liability for the purpose of the assessment, by the facts and trading which were previous to, and thus not within the cognizance of the Income Tax Acts on July 1, 1925. The result of this would be that it is necessary to go further and apply r. 1, sub-r. 2, of the "Rules applicable to Cases I. and II.," which runs: "Where the trade . . . . has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." Emphasis is laid upon the fact that there was no trade in the United Kingdom before July 1, 1925, with the result that you cannot use a measure or standard derived from facts which it is said are not relevant to the liability to tax which has supervened since they occurred. Secondly, it is said that the measure of the tax must be derived from matters cognate to the same case and liability; whereas the facts as to the trade antecedent to July 1, 1925, might have been relevant to a liability to tax suffered by the shareholders, who received dividends from Rangoon upon their holding in this Indian company, but that that liability was in respect of a foreign possession under Case V. and that such facts cannot now be used for a new purpose or have a different value put upon them in relation to a liability which is to be charged under Case I.

The main support for the first contention is derived from *Colquhoun* v. *Brooks*. (1) In that case it was held that a resident in the United Kingdom, who was a partner in a business carried on in Australia, and as such partner therefore carried on business "in the United Kingdom or elsewhere" was not liable to the extent of the profits of the business, but only in respect of so much of the profits as were received by him in the United Kingdom. It was held that Case I. was "not intended to apply to a trade carried on exclusively abroad" (per Lord Macnaghten (2). That, however, did not free the subject from all liability and he was held chargeable to tax under Case V. in respect of his receipts that were remitted over here, as being "income from possessions out of the United Kingdom." The ground of the decision on the first point was that there was no machinery for assessing the duty on trade profits arising and remaining abroad, and that the wider meaning of the Income Tax Act must be restricted accordingly. Lord Macnaghten (2), therefore, holds that "the 'first case' though clearly applying to a trade carried on partly abroad and partly in Great Britain, was not intended to apply to a trade carried on exclusively abroad."

To Case I., therefore, let the words be added "and not carried on exclusively abroad." But how far does this amendment carry the respondent? The company still remain charged to income tax in respect of their profits and gains from their trade which is now directed and controlled from London, for they are not excluded by the words of exception thus supposed to be added to Case I. Under *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter* (3) the tax falls upon

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(1) 14 App. Cas. 493.

(2) Ibid. 493, 516.

(3) [1895] 1 Q. B. 580; [1896] A. C. 31.

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the full amount of the balance of the profits or gains of their business and not only upon the amount of the actual sums annually received in the United Kingdom. This liability must be measured as directed by the Rule applicable to Case I., that is upon a three years' average. It is answered not so, because it is the first institution of the seat and control of the company in London that converted the trade exercised outside the United Kingdom into one equivalent to a trade exercised within the United Kingdom, and that must be the setting up and commencing of the taxable trade.

It is said mere residence will not do, for in *Egyptian Hotels, Ld.* v. *Mitchell* (1) it was admitted that the company resided in England (2), and yet it was held that the company was not taxable upon the whole of its profits, but only under Case V. on such part as was remitted to this country. The seat and control is the test. Lord Halsbury, in the *San Paulo* case (3), said: "the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading." Moreover it is the trader—the company—who is taxed in respect of his profits or gains, and r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. in terms refers to the trade and not to the trader. The trader is charged to tax in respect of his profits and gains and those are to be estimated as the rules direct. Did the trader then, the company, set up and commence his trade when on July 1, 1925, the seat and control of it passed to London? As to the meaning of those words simpliciter, Grove J. in a judgment assented to by Lindley J. in *Ryhope Coal Co.* v. *Foyer* (4) gives an interpretation of them as being not applicable to a mere change in the individuals constituting the firm or company, but to the setting up of an adventure or concern. "I think that the words 'set-up,' and 'commenced,' apply strictly to that, and" (the adventure or concern) "cannot be said to be 'set-up,' or 'commenced,' because there is a change in the partnership carrying on identically the same adventure or concern. . . .

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(1) [1914] 3 K. B. 118.
(2) Ibid. 127.
(3) [1896] A. C. 31, 38.
(4) 7 Q. B. D. 485, 494.

It appears to me that the words 'trade, manufacture, adventure, or concern,' apply to the undertaking, and have no reference to the individuals who carry it on." I venture to agree with this, and in my judgment it is not possible to hold that the trader, now chargeable to income tax, has by his becoming so liable, set up and commenced anew his business which has been in existence for years. Upon the interpretation in law to be given to these words, I reject the argument presented, and so far as it is a question of fact, the Commissioners have in terms held that the company carry on the same trade or concern in the nature of trade as they have carried on since their incorporation in 1919. To put a metaphorical meaning upon the plain words appears to disregard the direction of the House of Lords in *Ormond Investment Co.* v. *Betts.* (1) In that case the Court of Appeal had by analogy treated the purchase of foreign securities as the setting up and commencement of a trade for the purposes of the rule to which it appeared for purposes of assessment the liability had been referred. Lord Sumner (2) rejects such an analogy, and says that "the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for." Lord Atkinson (3) equally rejects this suggested adaptation of the words of the Act. Lord Wrenbury (4) points out the difference between trade and an investment; and Lord Warrington says (5) that the employment of the words by the Court of Appeal is "a mere assumption and not justified by anything in the Act of Parliament." These speeches recall attention to the words of the statute; and in accordance with this direction, it seems impossible by analogy or metaphor to treat a trade which has been going on for years as newly set up and commenced, contrary to the facts, and, by this device to justify the application of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918.

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(1) [1928] A. C. 143.
(2) Ibid. 143, 158.
(3) [1928] A. C. 162.
(4) Ibid. 167.
(5) [1928] A. C. 172.

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Next, I do not find a difficulty in applying a measure derived from facts which when they took place, lay outside the purview of the income tax law. This appears to me to have been decided in *Singer* v. *Williams.* (1) In considering the effect of the saving clause contained in s. 5 of the Finance Act, 1914: " And nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current year or any subsequent year any sums which represent . . . . (*b*) income from any such securities, stocks, shares, or rents which was paid or became due before the 6th day of April, 1914," Lord Cave (2) expressly refers to the argument that if the tax is computed upon an average of three years preceding the financial year in question, such computation must include income which was paid or became due before April 6, 1914, and is an infringement of the saving clause above quoted. He rejects the argument. He says that the exemption has no reference to the computation of income for the purpose of s. 5 of the Act of 1914. Lord Atkinson says there is nothing to prevent the previous years being taken into account in fixing the fair and just average of the income.

In the later case of *Bradbury* v. *English Sewing Cotton Co.* (3) Lord Cave refers to *Singer* v. *Williams* (1) as the case in which it was pointed out that " the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation." So, too, in *Stevens* v. *Boustead & Co.* (4) the deduction of the cost of premises abroad where the business was carried on was allowed, and a limitation of such a deduction to premises that were assessable to income tax under Sch. A was not accepted.

In accordance with these cases the argument that unless the material is the subject of taxation it cannot provide a basis for measure must be rejected. It seems right to take the available data from the actual trade during the three relevant years as the foundation of the computation of the profits or gains brought into charge. It is thus unnecessary to go further to the later r. 1, sub-r. 2, as it might be necessary to do, if the required data were not in existence and available. There is thus no necessity to put an artificial or metaphorical meaning upon the words "set up and commenced" in that rule.

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(1) [1921] 1 A. C. 41.
(2) Ibid. 52, 53.
(3) [1923] A. C. 744, 752.
(4) [1918] 1 K. B. 382.

There remains the second argument of the Crown, which is based upon *Bradbury* v. *English Sewing Cotton Co.* (1), and some observations made in the speeches in the House of Lords. It is said that the trading of the three years antecedent to the year of assessment formed the basis of taxation under Case V. upon the shareholders of the corporation who received their dividends paid out of it, as being income arising from a foreign possession. Thus this trading had received a definite character which cannot be changed. This reasoning appears to me not only artificial, but not well founded upon anything in *Bradbury's* case. (1) In that case the American company was taxed first of all as resident in this country upon its whole profits. Later it was sought to refer again to those profits, under a different category—namely, as income from a foreign possession. It was held that the Crown could not do this. The profits of that trading had been stamped as falling within Case I. in the most definite manner by charging tax upon them under that Case. The character of these same profits could not be changed, and they could not be made use of in a different capacity as income from foreign possessions in the hands of the same taxpayer. I note what Lord Shaw says (2) that the Cases (the report says rules) were made to apply so as to disintegrate into categories the cases of liability to taxation in the Schedule. "The separate cases mean the separate instances." Lord Wrenbury says (3) that the company "cannot be foreign for one purpose of the Acts and not for another." But it is to be observed that the subjects of those observations are the company, and the profits; the same profits which were irrevocably treated as profits chargeable under Case I. No such change of attitude is attempted in the present case. It may be that some taxpayers over here have paid tax upon their dividends received as derived from a foreign possession; but I fail to see how that charging can prevent the totality of the profits of the trade being treated, in the hands of a different taxpayer, namely the company, as the measure of that entity's liability to tax.

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(1) [1923] A. C. 744.

(2) [1923] A. C. 755.

(3) [1923] A. C. 769.

We were pressed with Lord Shaw's observations in the *Bradbury* case. (1) But in the present case, to use the company's profits for the purpose of a measure is not to use profits which have been already defined and taxed under one category and take them into account for another. It is not a reopening of the past or a reversal of their attitude on the part of the taxing authorities, for the profits that were made in the three years taken for average purposes have not been defined and taxed in any other way in the hands of the corporation.

For these reasons, I am of opinion that the appeal must be allowed with costs here and below, and the decision of the Commissioners restored.

LAWRENCE L.J. The question in this case is whether the removal by the company, on July 1, 1925, of the seat of control of its trade from Burma to London constituted the setting up and commencement of a trade on that day within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918.

The Commissioners have found that this removal did not cause and was not intended to cause any alteration in the carrying on or working of the company's undertaking; that the trade carried on by the company after such removal was the same trade or concern in the nature of a trade as had been carried on by the company since its incorporation in the year 1919; and that upon the evidence before them the trade of the company had not been set up and commenced within the year of assessment. The Commissioners accordingly held that the assessment on the company for the year ending April 5, 1926, must be made in accordance with the Rule applicable to Case I. of Sch. D on the full amount of the balance of profits and gains computed upon a fair and just average of the three years ending June 30, 1924.

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(1) [1923] A. C. 758.

Rowlatt J. on appeal reversed the determination of the Commissioners and held that the removal to London of the seat of control of the company's trade operated as the setting up and commencement of a trade, and, accordingly, that the assessment upon the company fell to be made in accordance with r. 1, sub-r. 2, of the Rules applicable to Cases I. and II.

With the greatest respect for the opinion of the learned judge, I think that he was wrong in disturbing the finding of the Commissioners. In my opinion the question whether a trade has or has not been set up and commenced within the year of assessment is a pure question of fact. For instance, if a company trading in Liverpool were, for the convenience of the individual members of the board, to resolve that in future its board meetings should be held in London instead of in Liverpool without in any way altering the character of its trade, I do not suppose it would be suggested that the mere change in the seat of control would constitute the setting up and commencement of a new trade. On the other hand, there might be attendant circumstances which would give rise to questions whether or not the company in the case I have supposed had in fact set up and commenced a new trade. For instance, if the trade of the company had in the past been purely local, such as a shop, and in addition to removing the seat of control, the company had opened a branch establishment in London, or had closed down the Liverpool shop and opened a new shop in London, it might well be that a new trade had been set up and commenced, and in such a case, no doubt the removal of the seat of control would be one of the facts to be taken into consideration in determining this question.

Does it, then, make any difference in principle that the removal of the seat of control to London is from a place outside the United Kingdom, and, as in the present case, from such a distant place as Burma? In my judgment, it does not. In both cases it is a question of fact to be determined on the evidence whether or not the company has merely shifted the seat of control of its trade from one place to another and still carries on the same trade, or whether it has set up and commenced a new trade.

Sir Boyd Merriman contended that the conclusion of the Commissioners was a mixed finding of fact and law. Whilst admitting that the company had not in the ordinary commercial sense set up and commenced a new trade on July 1, 1925, he contended that the expression "where the trade has been set up and commenced" in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. bore a special meaning which included not only a case where a new trade had in fact been started, but also a case where an established trade had been brought for the first time within Case I. of Sch. D. In my judgment this contention is not well founded. The decision of the House of Lords in *Levene* v. *Inland Revenue Commissioners* (1) shows that the Court ought not to attach to familiar English words used in the Income Tax Act, 1918, any special or artificial meanings unless the context demands it. Now the expression "to set up and commence 'a trade'" is a familiar English expression meaning "to start or begin a new trade" and there is no context in r. 1, sub-r. 2, or in any other part of the Income Tax Act, 1918, which demands that any special or artificial meaning should be attached to that expression, consequently, it ought to receive its ordinary and natural meaning, with the result that the question which the Commissioners had to determine was not a mixed question of law and fact, but purely a question of fact. The reasons advanced by Sir Boyd Merriman why the expression in question ought to bear a special or technical meaning were that under the Rule applicable to Case I. the profits which are to be used to measure the tax must be profits arising from

(1) [1928] A. C. 217.

a trade in respect of which the trader has been taxable during the whole or some part of the three years preceding the year of assessment, and that as that rule (according to the decision in *Colquhoun* v. *Brooks* (1)) does not apply to a trade carried on exclusively abroad, therefore in a case like the present the three years' average does not apply, and the trade must be deemed to have been set up and commenced within r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. when its owner first became taxable in respect of it under Case I. This reasoning is in my opinion fallacious. Even if the contention that in the present case the profits in the three years preceding the year of assessment could not be brought into computation were well founded, it would by no means follow that the company would be assessable under r. 1, sub r. 2, of the Rules applicable to Cases I. and II. as having set up and commenced a trade. In that case the logical result, in view of the finding of the Commissioners, would be that the company would escape taxation for the first year of assessment, and not that an artificial meaning should be given to the plain words of r. 1, sub-r. 2, in order to avoid such an escape.

The question whether the company can in the circumstances properly be assessed on a three years' average, or whether it can escape taxation, does not arise in the present case, as the company has accepted the decision of the Commissioners on this point, but I think that the company and the Commissioners were right in assuming that the fact that the company did not become taxable in respect of its trade until July 1, 1925, does not prevent the profits arising from that trade before that date from being brought into computation for the purpose of assessing the tax payable for the year ending April 5, 1926, and that therefore the contention of the Crown breaks down in limine.

In *Singer* v. *Williams* (2) it was held that although by virtue of s. 5 (*b*) of the Finance Act, 1914, income from foreign possessions paid or due before April 6, 1914, was not taxable, yet it ought to be brought into computation for the purpose

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(1) 14 App. Cas. 493.

(2) [1921] 1 A. C. 41.

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of arriving at the amount of tax payable on a three years' average after that date.

In *Bradbury* v. *English Sewing Cotton Co.* (1), which was also a case dealing with the assessment of tax under Case V., Viscount Cave L.C. said (2): "As was pointed out in *Singer* v. *Williams* (3) the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation."

Although both *Singer* v. *Williams* (3) and *Bradbury* v. *English Sewing Cotton Co.* (1) were cases dealing with tax in respect of income arising from foreign possessions, and therefore governed by provisions other than those with which the present case is concerned, yet I think that the decision in the former case provides a close analogy to the present case and strongly supports the opinion which I have formed that the fact that the company is not taxable in respect of its trade before July 1, 1925, does not prevent the profits arising from that trade in the three preceding years from being treated as a measure of taxation in the year ending April 5, 1926.

The cases of *Colquhoun* v. *Brooks* (4) and *Bradbury* v. *English Sewing Cotton Co.* (1), upon which Sir Boyd Merriman chiefly relied, do not in my opinion bear out his contention that this view is wrong.

Colquhoun v. *Brooks* (4) decided that a person resident in the United Kingdom and engaged in a trade carried on exclusively abroad is not taxable under Case I. in respect of that trade, but is taxable under Case V. in respect of so much only of the profits of that trade as are received by him in the United Kingdom as being income received from foreign possessions. That case did not purport to decide that, for the purpose of computing the amount of tax payable in the year of assessment in respect of a trade admittedly within Case I., the profits arising from that trade in previous years

(1) [1923] A. C. 744.
(2) Ibid. 752.
(3) [1921] 1 A. C. 41.
(4) 14 App. Cas. 493.

and before any tax became payable in respect of it could not be taken into account.

In *Bradbury* v. *English Sewing Cotton Co.* (1) the tax-paying company was a company registered and carrying on business in the United Kingdom and was during the whole of the three years preceding the year of assessment the holder of the common stock of the American company. During those three years the Crown had successfully maintained that the American company was resident and trading in England, and it had been taxed under Case I. accordingly. As the result of this taxation the English company had suffered income tax by deduction on that footing. On the removal of the American company from England to America the Crown sought to bring the same interest which it had theretofore treated as profits divided by a company resident and trading in England, into computation as being income arising from foreign possessions for the purpose of assessing the tax which, after the removal of the American company, became payable by the English company under Case V. The House of Lords by a majority decided that in the special circumstances of that case the Crown could not be heard to say that the profits arising during the three previous years from a trade in respect of which tax had during those years been levied on the footing that it was being carried on in the United Kingdom was income arising from foreign possessions which ought to be brought into computation in assessing the tax which, after the removal of the American company, had become payable by the English company in respect of income arising from foreign possessions. The facts of that case differ essentially from the facts of the present case, and in my opinion the decision has no application here. In the present case the company prior to July 1, 1925, resided out of the United Kingdom and carried on its trade exclusively abroad, it was therefore wholly outside the purview of the revenue laws of this country and was not taxable and had not been taxed either under Case I. or under Case V. or at all. The passage which I have cited from the Lord Chancellor's

(1) [1923] A. C. 744.

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speech in *Bradbury's* case (1) shows that the decision in that case has no application to a case where the income sought to be brought into computation had not previously been taxable or taxed, but is based solely on the fact that the Crown had in the previous period taxed the profits on the footing that they arose from an English trading concern, and was thereby precluded from placing or reckoning the same profits under another category. Lord Shaw, after pointing out that it would clearly be contrary to law to compel a taxpayer while paying under one category also to pay taxation under another category, proceeds as follows (2): "It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have been already defined and taxed under one category as to be taken into account for the purpose of averaging under another category." This passage, although much relied upon by the Crown, can in my opinion have no application to a case like the present where the profits of the preceding years have not been defined or taxed under any other category. It was indeed suggested that shareholders resident in the United Kingdom during the preceding three years would presumably have been taxed under Case V. in respect of dividends remitted to them in this country during that period, and that such taxation would bring the present case within the principle enunciated by Lord Shaw. This suggestion in my opinion involves a confusion of ideas. The income tax which any individual shareholder may have had to pay in this country before the company became resident and taxable here has nothing to do with the question now before the Court. What we are here concerned with is the tax payable by the company in respect of its trade, and neither that trade nor the profits arising from it has or have in the hands of the company been theretofore defined or taxed in this country under any category. A shareholder who was resident in the United Kingdom during the three years preceding the year of assessment and has during that period been assessed to income tax under Case V. in respect of the

(1) [1923] A. C. 744, 752.

(2) [1923] A. C. 758.

dividends remitted to him in this country may possibly bring his case within the principle of the decision in *Bradbury's* case (1) and accordingly obtain relief in respect of the tax deducted by the company from his dividends for the year ending April 5, 1926, but I think that the Commissioners were wrong in suggesting in clause 5 of para. 12 of the Case that this fact would necessitate any adjustment of the assessment upon the company under Case I.

In the result I have come to the conclusion that the point made on behalf of the Crown that the profits arising from the previous three years' trading of the company whilst resident in Burma cannot be brought into computation for assessing the tax payable by the company in respect of its trade for the year ending April 5, 1926 (upon the soundness of which point the whole of the Crown's case is based), is not sustainable; that there is no authority which compels the Commissioners or the Court to attach any artificial meaning to the expression "set up and commenced" in r. 1, sub-r. 2, and that this expression should be construed, as the Commissioners have construed it, according to its ordinary and natural meaning; and lastly that the question which the Commissioners had to determine was a pure question of fact, and that there was ample evidence upon which they could come to their determination, and that therefore such determination ought not to have been disturbed.

For the reasons stated I agree that the appeal succeeds and that the order of the Court below ought to be discharged and the case sent back to the Commissioners to assess the tax on the footing of their determination.

RUSSELL L.J. The question for decision on this appeal is whether the assessment of the company to income tax under Case I. of Sch. D, in respect of the profits and gains arising from the company's trade for the year ending April 5, 1926, falls to be made under "Rule applicable to Case I." or under r. 1, sub-r. 2, of "Rules applicable to Cases I. and II."

(1) [1923] A. C. 744.

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CORPORATION.

Russell L.J.

I need not state in detail the facts of the case; it is sufficient to bear in mind the findings of the Commissioners which are contained in para. 8 of the Case, and which show that the company's trade is being carried on exactly as it was carried on for some years before July 1, 1925, with this single exception, that since that date it has been obligatory to hold all directors' board meetings in Great Britain. This obligation originally arose by reason of a memorandum in writing, signed by a majority of the directors under clause 106 of the company's articles of association as then framed, by which it was determined that the meetings of the board should thenceforth be held in London. By clause 106 of the company's present articles, which were adopted by special resolution passed on December 30, 1925, and confirmed on January 15, 1926, it is provided that meetings of directors shall be held in Great Britain, or if and when so determined by the majority of the board in writing, in British India or elsewhere. The control of the company's affairs, and with it the control, or the power of control over the carrying on of its trade, has thus since July 1, 1925, been transferred to Great Britain, with certain consequences as to liability in respect of income tax under Sch. D which I will endeavour to indicate.

Down to July 1, 1925, no tax under Sch. D was chargeable in respect of the annual profits or gains arising or accruing to the company from its trade. It was not resident here. No words of para. 1 (*a*) of Sch. D applied to the case. From July 1, 1925, onwards the position was changed. The company became, for all income tax purposes, a person resident in Great Britain and the words of para. 1 (*a*) (ii.) of Sch. D applied to it; tax under Sch. D became chargeable in respect of the annual profits and gains arising or accruing to the company from its trade. Whether the tax which thus became chargeable should be charged under Case I. or Case V. is not here in dispute. It is common ground that the tax is chargeable under Case I.

The question for decision is a pure question of construction of the Rules applicable to Sch. D: and in particular the two rules mentioned above. The rules in question have nothing to do with the charging of the tax, but are concerned only with the method or machinery of computing the tax which has already been charged under other provisions of the Act. The argument by counsel for the company is based on the plain words of the Rule applicable to Case I. They say that the words fit the company's case exactly. The tax now extends to the company's trade; compute it then on an average of three years ending on one or other of the alternative days mentioned in the rule. The necessary figures are all available, for the company has carried on the same trade ever since its incorporation in 1919.

It seems to me that unless for some reason we are compelled to place a special or restricted meaning upon the language of this rule, the contention of the company must succeed.

The Crown's argument on the construction of this rule was, if I followed it correctly, twofold. In the first place it was said: Tax under Sch. D is not chargeable under Case I. in respect of a trade which is carried on exclusively abroad: therefore the Rule applicable to Case I. does not contemplate or include the case of a business carried on exclusively abroad; therefore the words "the said trade" cannot refer to a trade which during the three years in question was carried on exclusively abroad; therefore the present assessment cannot fall under that rule.

Speaking for myself I accept the first step in the argument, for I think that *Colquhoun* v. *Brooks* (1) did decide that Case I. does not include the case of a trade carried on exclusively abroad, but that such a case falls within Case V. But with the rest of the argument I cannot agree. Although no tax under Sch. D is charged under Case I. in respect of a trade while carried on exclusively abroad, I cannot see why, if some event happens which results in such tax being chargeable under Case I. in respect of that trade, the figures of the previous profits and gains of that trade should not be resorted to, as the measure for computing the tax which has become chargeable. The wording of the Rule applicable to Case I. justified the adoption of this method of computation, and it seems a reasonable method for the statute to allow.

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(1) 14 App. Cas. 493.

The words "the said trade" cannot, in my opinion, properly be read, as the Crown seeks to read them, as limiting the application of the rule to the case of a trade as to which it can be said that during each of the three years in question tax under Sch. D was chargeable in respect thereof under Case I. As was pointed out during the argument the words "the said trade" appear in the rule only for the purpose of defining the termination of one of the two alternative periods of three years which are specified in the rule. If the other alternative period were adopted, the words do not come into play at all.

In the next place counsel for the Crown contended that the rule could not apply to the case of the company, because it had been established by authority, that under the Act income, in order to be available for use as a measure for the purpose of computing the tax, must have fallen to be taxed under the same schedule and under the same Case as the income which is sought to be charged. It was alleged that this proposition was established by *Bradbury* v. *English Sewing Cotton Co.* (1) I have considered that case with care, and I can find therein no justification for the proposition which the Crown seeks to found upon it. The decision, as I read it, was simply this, that dividends on the stock of the American company received by the English company during any part of, what Lord Cave calls, the first three years, could not be brought into computation for the three years' average to be struck under Case V. in assessing the English company's income from foreign possessions in respect of any of, what Lord Cave calls, the second three years; and for this reason that during the first three years the stock of the American company was not a foreign possession of the British company, and consequently dividends thereon were not income from foreign possessions. The stock was not a foreign possession, because the locality of the stock was determined by the place of the American company's place of residence and trading which during those first three years was England. That statement of the decision represents accurately, I think, the views of Lords Cave, Shaw, Wrenbury and Phillimore. There is no justification to be found therein for the Crown's proposition, which indeed seems hardly consistent with the following passage from Lord Cave's speech (1): "As was pointed out in *Singer* v. *Williams* (2) the fact that the income of a previous year is not taxable, does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year, and so being treated as a measure, though not as a ground, of taxation." Reliance was placed on certain remarks by Lord Shaw (3), but I find myself unable to discover therein any support for the Crown's argument. All that Lord Shaw is saying is, I think, that the Crown cannot claim to tax for the same years the same income in two different categories, i.e., the Crown could not in respect of the same periods treat the American company as taxpayer in respect of the profits from trade under Case I. and the English company as taxpayer in respect of income from foreign possessions under Case V. He is saying this in order to emphasize the fact, that the dividends received by the English company during the first three years were not income from foreign possessions.

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(1) [1923] A. C. 744.

Accordingly, in my opinion the proposition of the Crown is not established by the only authority which was vouched in support. Apart from authority I see no reason for assenting to the proposition.

The result so far is that in my view the case of this company falls within the language of the Rule applicable to Case I.

The Crown further contended that this company's trade had been set up and commenced within the year of assessment, within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II.; and that the assessment fell to be made under that rule. I cannot agree. The trade has been continuous since 1919. All that happened within the year of

(1) [1923] A. C. 752.

(2) [1921] 1 A. C. 41.

(3) [1923] A. C. 744, 756, 758.

assessment was that the place from which the general control of the company's affairs is exercised was shifted to this country. True it is that within the year of assessment tax under Sch. D became for the first time chargeable in respect of the profits or gains from this company's trade, but by no stretch of language or imagination do I feel justified in holding that this trade was set up or commenced when its profits or gains became chargeable. It was set up and commenced long ago. The only change which has occurred is in the venue of the board meetings. This change sets up and commences a new point of control of the trade, and has the effect of making tax in respect of the profits therefrom chargeable under Sch. D; but it does not constitute the setting up or commencement of the trade.

For these reasons I am of opinion that the decision of the Commissioners upon the question of general principle was correct, that the assessment falls to be made under the Rule applicable to Case I., and that the appeal should be allowed accordingly.

Appeal allowed.

Solicitors for the appellants: *Birkbeck, Yeo & Co.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

W. I. C.

LEEMING *v.* JONES (INSPECTOR OF TAXES).

K. B. D.
1928
June 18.
1929
Jan. 15.
C. A.
June 19, 20, 21, 24.

Revenue—Income Tax—Purchase and re-sale of Option to purchase Real Estate—Isolated Transaction—Trading negatived by Commissioners—Annual Profits or Gains—Accretion to Capital—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and VI.*

The respondent joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. The estate was not large enough for re-sale to a public company to be formed to work it, and they accordingly acquired a further option to purchase an additional estate. Ultimately the two estates were sold to a company at a profit of 3000*l.* of which, after deduction of expenses, the respondent's share was 623*l.* 10*s.* The respondent having been assessed to income tax on this sum appealed. The Commissioners found that the respondent acquired the property or interest in the property with the sole object of turning it over again at a profit, and that he at no time had any intention of holding the property or interest as an investment, They subsequently found, on the case being referred back to them, that the transaction in question was not a concern in the nature of trade:—

Held (affirming the decision of Rowlatt J.), that having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being merely an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax under Case VI. of Sch. D of the Income Tax Act, 1918.

Pearn v. *Miller* (1927) 11 Tax Cas. 610 approved.

Cooper v. *Stubbs* [1925] 2 K. B. 753 distinguished.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland for the opinion of the King's Bench Division.

At a meeting of the above Commissioners held on April 12, 1927, the appeal of James Leeming was heard against an assessment for the year ended April 5, 1926, to income tax under Sch. D in the sum of 623*l.* 10*s.*, on the ground that there was no liability under Case I. or under Case VI. of Sch. D.

The following facts were admitted or proved :—

In July, 1925, the appellant was invited to join a syndicate for the acquisition of an option over a rubber estate called Saskpow Estate, near Ipoh, in the Federated Malay States, on the basis of his paying one-fourth of the cost of securing the option, paying option money, and the cost of reports on the property, and receiving one-fourth of the profit made on the re-sale. The appellant agreed by cablegram to join the proposed syndicate and to take one-fourth. The other three-fourths were held by Messrs. Brown, Phillips & Stewart, Ipoh; Messrs. Macphail & Co., Ld., Ipoh; and David Carruthers, jun., solicitor, Kilmarnock.

No formal agreement was entered into between the parties, and practically the whole of the correspondence was conducted by cablegram. The negotiations in the East were conducted by Brown, Phillips & Stewart, and in the United Kingdom by Carruthers. Brown, Phillips & Stewart obtained a report and valuation on the Saskpow Estate, and on August 10, 1925, entered into an option agreement between the owner of Saskpow Estate, Chin Ah Pow, of Ipoh, on the one part, and Carruthers on the other part. Although the option was taken in the name of Carruthers for convenience, and was executed in Ipoh by his attorney on his behalf, the agreement was entered into on behalf of the four participants on the footing above explained. This applied to all the subsequent negotiations, Carruthers acting throughout on his own behalf and as trustee for the other members of the syndicate.

As it was considered that the Saskpow Estate, which extended to 542 acres, was too small for re-sale to a company for public flotation, it was agreed amongst those interested that Brown, Phillips & Stewart should endeavour to acquire other properties with a view to combination, but as this had not been accomplished by the end of August, the appellant himself proposed to acquire the estate, or alternatively to take a controlling interest in a private company formed to acquire the estate, and this question was under consideration when negotiations were commenced for the acquisition of an immediately adjoining estate called Dusun Bertam, an option to acquire which was obtained on September 16, 1925. The option to secure Saskpow Estate was at the price of 225,000 Straits dollars, equal to 26,250*l.*, and the option to acquire the Dusun Bertam Estate was at the price of 35,000*l.* It was thereupon decided to resell the two estates to a public company to be formed to acquire them, and Carruthers undertook to find people to promote a public company for this purpose. Considerable negotiations took place with the owners of Dusun Bertam Estate with a view to their reducing their purchase price, and it was ultimately agreed that the vendors would give an abatement on the price of 1750*l.* (i.e., 5 per cent.), which was stated in the form of a commission for introducing a purchaser, but, it was claimed by the appellant, as in reality a deduction from the price.

On October 9, 1925, Carruthers transferred the joint rights to the Oceanic Investment Company for a sum of 1250*l.*, retaining also on behalf of himself and the three others interested the 5 per cent. allowance made on the price of Dusun Bertam Estate, and the Oceanic Investment Company thereupon promoted a company called the Ipoh Rubber Estate, Ld., to whom they resold the properties at the price paid by it, the Oceanic Investment Company. After deducting from the 1250*l.* and 1750*l.* (making together 3000*l.*) the expenses incurred in connection with the sale of the estates, and a fee to Brown, Phillips & Stewart for carrying out the acquisition of the properties, the net profit was divided in four, and the appellant's fourth share of it amounted to 623*l.* 9*s.* 4*d.* The appellant was consulted for his interest from time to time by Carruthers, but took no active part in the negotiations for the purchase or sale of the rights.

On behalf of the appellant it was contended :—

(*a*) That the sum in respect of which the assessment had been made was not profit or gain within the meaning of the Income Tax Acts or an assessable profit at all.

(*b*) That the mere fact that the appellant acquired the property or an interest in it for the purpose of its being resold at a profit did not bring the case within Case I. of Sch. D of the Income Tax Act, 1918.

(*c*) That there was no liability to tax unless the sum in question was a profit or gain arising from the carrying on by the appellant of the trade or business, and there was no trade or business.

(*d*) That the sum in question arose from a casual or isolated transaction, and not from any systematic course of dealing.

(*e*) That there was in the transaction one sale only, and that one sale did not constitute or make a trade.

(*f*) That Case VI. did not apply, and that an assessment made under it was invalid and erroneous.

The cases of *Ryall* v. *Hoare* (1); *Cooper* v. *Stubbs* (2); *Martin* v. *Lowry* (3); *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (4); *Californian Copper Syndicate* v. *Harris* (5); and *Inland Revenue Commissioners* v. *Livingston* (6) were all distinguishable and did not apply, and the sole question in the case was whether the transaction was carried out in the course of and as part of a trade or business.

On behalf of the Crown it was contended—

(*a*) That the acquisition by the appellant of the interests was, on the evidence, with the sole object of combining them together and selling again in order to make a profit thereby.

(*b*) That a profit was admittedly made by him.

(*c*) That such a profit was a revenue profit, and not a capital profit.

(*d*) That the appellant was assessable in respect of the profit so made by him.

(*e*) That the assessment was correctly made and should be confirmed (subject to any necessary adjustment of figures).

The Commissioners were of opinion that the appellant acquired the property, or interest in the property in question, with the sole object of turning it over again at a profit, and that the appellant at no time had any intention of holding the property or interest in property as an investment, and reduced the assessment to 603*l*. 10*s*. to allow agreed deductions in respect of certain expenses incurred by the appellant himself in the course of the transactions.

The appellant having expressed dissatisfaction with the determination of the appeal as being erroneous in point of

(1) [1923] 2 K. B. 447.
(2) [1925] 2 K. B. 753.
(3) [1927] A. C. 312.
(4) [1921] 2 K. B. 403.
(5) (1904) 5 Tax Cas. 159.
(6) (1926) 11 Tax Cas. 538.

law and having duly required the Commissioners to state the Case for the opinion of the King's Bench Division, this Case was stated and signed accordingly.

The appeal was heard before Rowlatt J. on June 18, 1928.

A. M. B. Bremner for the appellant.

Sir Boyd Merriman S.-G. and *R. P. Hills* for the respondent.

ROWLATT J. This case is one of those in which the question is whether the difference between the price for which an article is sold and the price at which it was bought, it being an isolated transaction, can be regarded as an annual profit or gain taxable to income tax.

It is said that an isolated pair of transactions by purchasing and selling, if they show a profit, does not show a profit in the nature of income liable to tax; it is an accretion of capital value. If you repeat it habitually, it may become a trade that would be liable to tax. But even with regard to isolated transactions, there are several cases in the books where they have been held to afford an income which is taxable. When an important and large asset is bought, and it is sub-divided, and so made more marketable, and the sub-division is advertised, and so on, as in *Martin* v. *Lowry* (1); where you get a thing altered and treated and dealt with in an expert way and also sub-divided, as in the *Cape Brandy Syndicate* case (2); and where you get a thing, although not actually altered or sub-divided, that is thoroughly repaired and converted into a new and better article, as in *Inland Revenue Commissioners* v. *Livingston*. (3)

Now, what is the dividing line between the case of a man buying and selling in an isolated transaction and buying and selling in a transaction which is also isolated, but which can be said to yield a taxable income?

I venture to refer, with respect, to what the Lord President, Lord Clyde, said in *Inland Revenue Commissioners* v. *Livingston*. (4) He is dealing with this very point, and he says: "I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade,' is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made." That covers all the cases. In the *Cape Brandy Syndicate* case (1) what the appellants had was in the ordinary line of business as brandy importers, and so on; what they had in *Martin* v. *Lowry* (2) was what is done in the ordinary case of merchants buying a thing, advertising it and so on; and what was done in *Livingston's* case (3) was in the ordinary course of the business of ship dealers and repairers, and so on. That is what was done in all the cases, and I think it ought to be applied in this case; but I am not going to apply it; I am going to send the case back to the Commissioners, for these reasons. I think it is quite clear that what the Commissioners have to find is whether there is here a concern in the nature of trade. Now, what they have found they say in these words (I am reading it in short): That the property was acquired with the sole object of turning it over again at a profit, and without any intention of holding the property as an investment. That describes what a man does if he buys a picture that he sees going cheap at Christie's, because he knows that in a month he will sell it again at Christie's. That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. What the Commissioners must do is to say, one way or the other, was this—I will not say carrying on a trade, but was it a speculation or a venture in the nature of trade? I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property, and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

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(1) [1927] A. C. 312.
(2) [1921] 2 K. B. 403.
(3) 11 Tax Cas. 538.
(4) Ibid. 542.

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(1) [1921] 2 K. B. 403.

(2) [1927] A. C. 312.

(3) 11 Tax Cas. 542.

1928

LEEMING
v.
JONES.

Rowlatt J.

The Solicitor-General wishes to keep open the point—he will be able to make that good when the answer comes back—that you can get a profit resulting from the difference between an isolated sale and purchase into the scope of the Income Tax Act as an annual profit or gain without it being an adventure in the nature of trade, but by means of Case VI., the Court of Appeal, by a majority, having decided that although Case I. is negatived, you can still have Case VI. So that in this case, if they negative Case I., he will be still able, on the facts, as it was in *Cooper* v. *Stubbs* (1), to make it Case VI., though what element there can be in a case of that kind, of an isolated transaction of purchase and sale which would also bring it within Case VI. and differentiate it from a naked purchase and sale to secure an accretion such as a private person might do, I do not for the moment understand.

The result is that the case must go back with this intimation to the Commissioners.

The case was accordingly remitted to the Commissioners to find whether or not there was a concern in the nature of a trade. The Commissioners met on September 4, 1928, and after further consideration of the point remitted to them issued a Supplementary Case in which they stated their finding in the following terms:—

"The Commissioners, having considered the evidence and arguments submitted as to what took place in the nature of organising the speculation, maturing the property, and disposing of the property, and after due consideration of the facts and arguments submitted to them, find that the transaction in question was not a concern in the nature of trade, and they sign the Supplementary Case accordingly."

On January 15, 1929, the case again came before Rowlatt J., who after hearing counsel for the parties said: The result is that I must abide by my own decision in *Pearn* v. *Miller* (2), and the appeal must be allowed.

The Crown appealed. The appeal was heard on June 19, 20, 21, 24, 1929.

(1) [1925] 2 K. B. 753.

(2) 11 Tax Cas. 610.

Sir Boyd Merriman K.C. and *R. P. Hills* for the Crown. Rowlatt J. in deciding that the respondent could not be taxed under Case VI. relied on his own earlier decision in *Pearn* v. *Miller* (1), notwithstanding the decision of the Court of Appeal in *Cooper* v. *Stubbs.* (2) That was not right, having regard to the decision arrived at by the Court in the latter case. The Commissioners have held that the profits or gains were not in respect of a trade so as to come within Case I. It is submitted that Rowlatt J. was wrong in referring the case back to the Commissioners on the question whether the profits or gains arose from a concern in the nature of trade, and that he ought to have determined the question in favour of the Crown on the facts found in the first Case: *Pickford* v. *Quirke.* (3) But assuming that Case I. does not apply it is submitted on the authority of *Cooper* v. *Stubbs* (2) that Case VI. does. The position is that *Cooper* v. *Stubbs* (2) decided that the profits or gains were taxable under Case VI. unless they were a capital accretion, and the view that it was a capital accretion has been negatived by the Commissioners, otherwise they could not have confirmed the assessment.

[They were stopped.]

Latter K.C. and *A. M. B. Bremner* for the respondent. The question here is whether an accretion on a single sale is a profit or an accretion of capital, and that is a question of law and not of fact. There is nothing in common between this case and *Cooper* v. *Stubbs.* (2) In *Cooper* v. *Stubbs* (2) transactions had continued for over eight years at the rate of one or more a week. It is well settled law that the profits of an isolated transaction, as of purchase and sale, are not income and not assessable under Case VI.: *Assets Co.* v. *Forbes* (4); *Inland Revenue Commissioners* v. *Livingston.* (5) The application of Case VI. must have some limit put on it. It must relate to something ejusdem generis with the other things covered by the rest of Sch. D and the other Schedules: see *Attorney-General* v. *Black* (6) and *Severn Fishery Board* v.

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(1) 11 Tax Cas. 610.
(2) [1925] 2 K. B. 753.
(3) (1927) 13 Tax Cas. 251.
(4) (1897) 3 Tax Cas. 542, 548.
(5) 11 Tax Cas. 538.
(6) (1871) L. R. 6 Ex. 308, 309.

O'May. (1) An isolated profit is different from anything brought within the scope of the Income Tax Acts. Everything chargeable to tax is profits arising from a source. A man is not a source in that sense, otherwise he could charge for domestic expenses. But there must be a source of the income taxed such as property, trade, etc.: *Colquhoun* v. *Brooks* (2); *Brown* v. *National Provident Institution.* (3)

In *Whelan* v. *Henning* (4) the Crown went too far by contending that the liability to tax depended on the existence of a source and of income from a source. But the extent to which the source is important is shown by *Inland Revenue Commissioners* v. *Forth Conservancy Board.* (5) There the Crown elected to claim tax under Sch. A only, and failed in a claim to tax the surplus arising from shipping dues levied on ships entering the river and firth on the ground that the Board, having no right of property in the river or the firth, the surplus was not a profit arising out of lands within Sch. A.

[LORD HANWORTH M.R. Anything taxable must be "property, profits or gains" within s. 1 of the Income Tax Act, 1918, and, as the authorities have decided, from a source other than the man himself.]

Yes, and the explanation of Case VI. of Sch. D is that it applies to profits arising from something analogous to a trade, as in *Cooper* v. *Stubbs.* (6) Regard cannot be had to the intention of a person in making a particular purchase, whether it is to retain what is purchased or sell it again at a profit. That test is not justified by any authority and it is obviously inapplicable, for a person's intention might change after he had purchased the property.

Examples of accretions to capital not assessable to income tax are to be found in *Hudson's Bay Co.* v. *Stevens* (7); *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (8); *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (9); *Ryall* v. *Hoare* (10); *Martin* v. *Lowry* (11); and *Gas*

(1) [1919] 2 K. B. 484.
(2) (1889) 14 App. Cas. 493, 516.
(3) [1921] 2 A. C. 222, 235, 246.
(4) [1925] 1 K. B. 387.
(5) [1929] A. C. 213.
(6) [1925] 2 K. B. 753.
(7) (1909) 5 Tax Cas. 424.
(8) (1910) 5 Tax Cas. 658.
(9) [1921] 2 K. B. 403.
(10) [1923] 2 K. B. 447.
(11) [1927] A. C. 312.

Lighting Improvement Co. v. *Inland Revenue Commissioners.* (1)

Sir Boyd Merriman K.C. in reply. It is admitted that in order to justify taxation there must be a source of income: *Brown* v. *National Provident Institution.* (2) Here the source was the transaction described by the Commissioners in the Case stated. There was here a scheme of profit making as distinct from a change of investment. The fact that the transaction was an isolated one does not prevent its being a source. The intention is material in considering whether a transaction is a scheme of profit making or the realization or change of an investment. In *Californian Copper Syndicate* v. *Harris* (3) it was no doubt held that the enhanced price received on the realization of an ordinary investment was not taxable. See also *Livingston's* case. (4) But here there was not merely an isolated sale but very considerable expenditure was incurred by the vendors in effecting it. In *Malcolm* v. *Lockhart* (5) it was held that the profits earned by the services of a stallion kept as part of the stock of a farm but let out during the breeding season to neighbouring farmers were not profits in respect of the occupation of the farm, but were chargeable to income tax under Sch. D. See also *Carlisle and Silloth Golf Club* v. *Smith.* (6) It is a matter for the Commissioners to determine whether there is some additional taxable source. The ambit of Case VI. is shown by *Coman* v. *Governors of the Rotunda Hospital, Dublin.* (7)

Inland Revenue Commissioners v. *Forth Conservancy Board* (8) has no application to the present case. It was there held that the Board had no right of property in the river or firth. There was therefore no question of the existence of a source. Here there was a clear source of income, and the only question is whether it is a taxable one. The transaction took place in the year of charge.

(1) [1923] A. C. 723, 741.
(2) [1921] 2 A. C. 222.
(3) 5 Tax Cas. 159.
(4) 11 Tax Cas. 538.
(5) [1919] A. C. 463.
(6) [1913] 3 K. B. 75.
(7) [1921] 1 A. C. 1.
(8) [1929] A. C. 213.

The *Hudson's Bay* case (1) differed entirely from the present case on the facts. What the company there sold was its whole concern.

LORD HANWORTH M.R. This is a case of some difficulty by reason of the course which has been taken and of the findings that have been made by the Commissioners. Now I desire to call attention to the facts, for they are the foundation of the law which is applicable to them.

The respondent was one of four persons who joined together in what is sometimes called a syndicate, and bought a property called Saskpow, which is near Ipoh in the Malay Peninsula. It consisted of about 542 acres, so was not large enough for resale to a public company to be floated. These four persons therefore acquired an option to purchase another property which was called Dusun Bertam, and for that property they were to pay a larger sum. In the first place, for the Saskpow Estate they were to pay 26,250*l.*; for this Dusun Bertam Estate they were to pay 35,000*l.* Now when they had obtained those two properties they had obtained something which was worth the attention of a new company which would be formed. Carruthers was the agent who acted for them in the matter, and we find that in the latter part of para. 2 of the Case it is stated that: "On the 9th October, 1925, Mr. Carruthers transferred the joint rights to the Oceanic Investment Company," which seems to be a mere intermediary, "for a sum of 1250*l.*, retaining also on behalf of himself and the three others interested the five per cent. allowance made on the price of the Dusun Bertam Estate." Then the Oceanic Investment Company promoted a company called the Ipoh Rubber Estate Company, Ld., and these two properties were ultimately taken over by the Ipoh Rubber Estate Company, Ld. Now through the instrumentality of Carruthers and of this Oceanic Investment Company the estates were resold, and had never been held by these four persons who had originally acquired first the one and then the other, but in the course of these transactions there had been a sum totalling 3000*l.*

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(1) 5 Tax Cas. 424.

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which had inured to them as a profit. It does not matter whether one regards this 3,000*l.* as a deduction from price or as a commission of 5 per cent. or how it arose, but still in the hands of these four persons there was this sum of 3000*l.* From that sum of 3000*l.*, however, there had to be deducted the expenses incurred in connection with the sale of the estates, and a fee for Messrs. Brown, Phillips & Stewart for carrying out the acquisition of the properties. I have closely examined those statements and by computation discovered that those payments must have amounted to the sum of 506*l.* 2*s.* 8*d.* When those expenses and deductions had been made from the 3000*l.* there was then left a total sum of 2493*l.* 17*s.* 4*d.*, and as we are told in the Case, the profit divided into four left the respondent's share one-fourth of that sum—namely, 623*l.* 9*s.* 4*d.* The Commissioners say that after due consideration of the facts and arguments submitted to them they were of opinion that the respondent acquired the property or interest in the property in question with the sole object of turning it over again at a profit and that he at no time had any intention of holding the property or interest in property as an investment, and they reduced the assessment to 603*l.* 10*s.* to allow agreed deductions in respect of certain expenses incurred by the respondent himself in the course of the transactions. It is interesting that as an addendum to the Case there is a statement of the figures.

Upon those facts I agree with the learned judge that there was evidence of trading, and evidence of trading even though this one enterprise in relation to the two properties might be called an isolated transaction in the sense that these four persons were not constantly employing themselves in the buying and selling of properties; but having regard to the two properties, the expenses incurred and the negotiations involved, it appears to me that there was clear evidence for submission to the Commissioners of trading. Now the Commissioners' finding is not conclusive.

The matter then came before Rowlatt J. and he gave judgment on June 18 of last year. In that judgment he made a number of relevant observations, pointing out that if there is an engagement in an isolated transaction which affords an accretion of capital value, that is not liable to tax; but if there are several transactions so that the isolation can no longer be insisted upon, then there may be a trade; and he gave the well known illustration of a single transaction or a single enterprise which attracted tax—namely, the *Cape Brandy Syndicate* case (1); *Martin* v. *Lowry* (2); and the *Livingston* case (3); but he said that in the present case he did not know. He said of the finding which I have read: "That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. What the Commissioners must do is to say, one way or the other, was this—I will not say carrying on a trade, but was it a speculation or an adventure in the nature of trade? I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organising the speculation, maturing the property, and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not." Now all those observations of the learned judge appear to me to be both relevant and right. The Commissioners' finding was insufficient. It was necessary for them to determine the facts and the summation of the facts, and Rowlatt J., in calling their attention to the several points which I have read out, indicated, I think, to them that it was quite possible for them to find that this was an adventure in the nature of trade. Now at the time when that judgment was given the Solicitor-General (as he then was), Sir Boyd Merriman, desired to keep open the point as to whether or not, even if it was not found to be a trade falling within Case I. of Sch. D, he might be able to argue that it was a transaction which was taxable under Case VI. of Sch. D, and that point was reserved to him. The case went back to the Commissioners, and on November 20 of last year they stated a Supplementary Case, in which they say: "The

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(1) [1921] 2 K. B. 403.

(2) [1927] A. C. 312.

(3) 11 Tax Cas. 538.

Commissioners having considered the evidence and arguments submitted as to what took place in the nature of organising the speculation, maturing the property and disposing of the property" (those are the points to which Rowlatt J. had invited their attention), and "after due consideration of the facts and arguments submitted to them, find that the transaction in question was not a concern in the nature of trade"; and they signed this Supplementary Case accordingly. The matter then came before Rowlatt J. again on January 15 of this year, and he held that inasmuch as it had now been definitely found that there was not a trade or adventure in the nature of trade, the case could not fall under Case I. of Sch. D, and he held that the Commissioners in imposing a tax at all, as they had done, upon this assessment of 603*l*. 10*s*. must have imposed a tax upon what could only be an accretion of capital value, for they had not once, but twice, considered the matter, and in their second judgment made it abundantly plain that there was no trading and no adventure in the nature of trade. What, then, could this operation be except the buying of a property and the selling of it and an accretion of capital? Now Rowlatt J., and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, "of organising the speculation, of maturing the property," and the diligence in discovering a second property to add to the first, "and the disposing of the property," there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final Case negatived anything in the nature of an adventure or trade. That being so, Rowlatt J. then had the matter before him, and the Solicitor-General (as he then was) desired to keep open the point that still it was possible to intercept this profit under Case VI. Rowlatt J. declined to accede to that view. He said: "I must abide by my own decision in *Pearn* v. *Miller* (1), and this appeal must be allowed." The meaning of that decision is this, that relying on what had been said by him in *Pearn* v. *Miller* (1) he was, so to speak, bound by himself to hold that there was no liability to tax.

Now *Pearn* v. *Miller* (1) was a case in which seven properties had been purchased and four of them had been sold; the purchaser was a builder's foreman; and the question that arose there was whether or not he could be taxed under Case VI. Rowlatt J. had said (2): "If it is desired to tax the difference between what a man has bought goods for, or property for, and sold them for, you can only tax it, in my judgment, if you can say that what he did was a trade or adventure or concern in the nature of trade. I think you cannot get under Case VI. a tax out of appreciation of property; you have to get it under Case I." That is perhaps too wide a statement. I think what Rowlatt J. meant was that in a case where you have either an adventure or trade or an appreciation of capital value, if you do not get it as a trade you cannot get it as an appreciation of capital value. Now in that view I think that in the decision which Rowlatt J. reached he was right. We have to take the facts in this way: Inasmuch as after due deliberation the Commissioners have definitely held that what at first sight would seem to affect the matter does not alter their decision—namely, the way in which the syndicate have dealt with the property and acquired the second property and the like, and since the Commissioners have found that that was not a trade or adventure in the nature of a trade, one must put out of one's mind altogether a trade and Case I., and it appears to me by that negative of the Commissioners they must have meant that it was the accretion of a capital value which had been put upon this property and nothing else.

(1) 11 Tax Cas. 610.

(2) 11 Tax Cas. 614.

But it is said that Case VI. would apply. Now Case VI. is found among the Cases which are embedded in Sch. D, and it must be remembered that that Schedule is dealing with annual profits or gains, and Case VI. with annual profits or gains not falling within the purview of the other Schedules. I quite agree that a transaction which takes place in the year and is not recurrent may yet be "annual." The main ground upon which this appeal has been argued was that in *Cooper* v. *Stubbs* (1) it had been decided that you could use Case VI. to apply to a profit, and even a profit obtained by an accretion of capital, and that the two judges, Warrington and Atkin L.JJ., in that case, differing from the judgment which I had given, used Case VI. for that very purpose. Now bear in mind the distinction that we have to deal with in this case, that there is no adventure at all in the nature of a trade. I think both the judgments in *Cooper* v. *Stubbs* (1) which are relied upon clearly indicate that the learned judges in dealing with Case VI. were definitely holding that there must be some profits or gains in the nature of revenue, as contradistinguished from a profit arising upon capital. Warrington L.J. says (2): "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (*b*) of Sch. D. On the findings of the Commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Sch. D. It seems to me, therefore, that, in this case, whatever may be the case under different facts,

(1) [1925] 2 K. B. 753.

(2) [1925] 2 K. B. 769.

at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax." Observe, therefore, that he speaks of the profits arising from these dealings and transactions, and these dealings and transactions were the gambling transactions which had taken place over a long period of years; but those words of Warrington L.J. to my mind clearly show that he was not thinking of a case of capital accretion. Atkin L.J. makes the matter even plainer. He says (1): "It may very well be that transactions may be so carried out as to be nothing but in the nature of temporary investments repeated several times over, and resulting in something in the nature of capital accretions which could not be brought within the title or meaning of 'annual profit or gain,' which to my mind must mean something which is of the nature of revenue or income." With those passages in mind I think it would be wrong to say that the decision of the Court in making use of Case VI. was to say that where there were capital accretions, as in the present case, Case VI. applied to them. In the present case, as I repeat, we have necessarily by the finding of the Commissioners a capital accretion, and there was evidence on which they could come to that conclusion.

What is not trade is not taxed. Sch. D, I think, intends to attach tax to something which is a profit, as distinguished from a capital accretion. In view of the argument which has been presented to us I will just call attention to some of the cases which establish that quite clearly. Lord Young's words in *Assets Co.* v. *Forbes* (2) have often been referred to: "I should say that I have really no doubt that any person, or any company making a trade of purchasing and selling investments, will be liable in income tax upon any profit which is made by that trade. It is quite an intelligible business, just as intelligible as a trade consisting in the purchase and sale of goods in the ordinary trade of a merchant or shopkeeper. The trade is good or bad according as it is carried on profitably or not, in purchasing goods at the trader's price and in selling them at a retail price, or wholesale price, or larger price than that which he paid for them; and the profit or loss on his business consists in selling them at a profit or not. But it is another proposition altogether that, where that is not a trade, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income Tax Acts." In *Hudson's Bay Co.* v. *Stevens* (1), where there was a trading company which held a considerable quantity of land but sold a part of it, it was held to be selling its capital and not trading in the land. There is also the case of *Tebrau* (*Johore*) *Rubber Syndicate* v. *Farmer* (2), in which Lord Salvesen said (3): "No inference can be drawn from the fact that another estate was subsequently purchased, the price of which, taken along with the amount spent on development, substantially exhausted the assets at the disposal of the Syndicate. In any event I cannot find sufficient evidence from this single transaction, which at the same time brought the Syndicate to an end, that the profits so made are to be treated as income or gains made by trade."

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(1) [1925] 2 K. B. 753, 775.

(2) (1897) 3 Tax Cas. 542, 548.

Those cases show that Case VI. ought not to be treated as an addendum to the Income Tax Act, a separate section by itself, quite independent of s. 1, quite independent of all the Schedules and to be used outside the Schedules for the purpose of taxing, the manner of which is otherwise so carefully delimited in the Schedules and their several rules. Some limitation must be put upon it, just as in *Foley* v. *Fletcher* (4), and in other cases. The case to which our attention was drawn in particular on this point was *Attorney-General* v. *Black* (5) in which Lord Blackburn, dealing with this point and the wide net which is spread by Sch. D, says (6): "The question, then, is, whether this particular income does come within the description of 'property or profit'; and after listening attentively to the arguments for the appellants, I have come to the conclusion that it does. The mention of 'rights of markets and fairs' and 'tolls' in Sch. A., No. III., shews the intention of the legislature to include in the general sweeping words of Sch. D, sources of income similar to these." Lord Blackburn, it appears to me, expressed there a cardinal feature of the Income Tax Acts. There must be a source. It is said in the present case that there is a source because there were these properties, the buying and the selling of them; but all that is swept away when trade is negatived and you have nothing but an accretion of capital. Is that a source? Now in *Colquhoun* v. *Brooks* (1) (I refer again to what Lord Blackburn has said) Lord Macnaghten in passages that I will not read fully says: "I use the expression 'source of income,' because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in s. 52, uses the expressions 'sources chargeable under the Act,' and 'all the sources contained in the said several schedules' as describing everything in respect of which the tax is imposed." The importance of that was reaffirmed in *Brown* v. *National Provident Institution* (2), where Lord Haldane pointed out in a number of passages the importance of there being a source, and that if there is not a source then there is no possibility of taxation. Perhaps Lord Atkinson puts that point best in concert with all the other noble Lords, where he says (3): "It was a tax assessed, levied, and collected yearly on the profits and gains arising and accruing during the year in which it was collected from one or more of the sources named. If this be so, as in my opinion it clearly is, it necessarily follows that if in the year of assessment a source of income should dry up and no income accrue, then no tax could be levied or collected in respect of a non-existing income." But the passages in the case relying upon there being a source of income are too many for me to refer to them individually.

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(1) 5 Tax Cas. 424.
(2) 5 Tax Cas. 658.
(3) Ibid. 665.
(4) (1858) 3 H. & N. 769.
(5) L. R. 6 Ex. 308.
(6) Ibid. 310.

In *Grainger* v. *Maxwell* (4) I referred to what had been said in the previous cases. I refer to the importance again of there being a source, following *Brown* v. *National Provident Institution* (2), to which I have referred. Finally, I think

(1) 14 App. Cas. 493, 516.
(2) [1921] 2 A. C. 222.
(3) [1921] 2 A. C. 246.
(4) [1926] 1 K. B. 430, 439.

Rowlatt J., whose experience in these cases is so large, in *Ryall* v. *Hoare* (1) puts the limitation quite accurately; but before I refer to that case I will say a word or two more.

It is said that if you are looking for a source you can have a source, one which would be sufficient for Case VI. even if you cannot have one that brings the profits within Case I. You may say, as Sir Boyd Merriman and Mr. Hills have said, that it was a scheme for making a profit. I am not at all satisfied that that is a good test. A scheme is a sort of metaphorical term to which I cannot attach any precise meaning. We have to bear in mind what I think Rowlatt J. has rightly said in *Ryall* v. *Hoare* (2): "Two kinds of emolument may be excluded from Case VI. First, anything in the nature of capital accretion is excluded as being outside the scope and meaning of these Acts confirmed by the usage of a century. For this reason, a casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business is not liable to tax. 'Profits or gains' in Case VI. refer to the interest or fruit as opposed to the principal or root of the tree." That seems to me quite sound, and is particularly illustrated by the cases on which reliance was placed by counsel for the appellant. Take *Malcolm* v. *Lockhart*. (3) That was the case where a stallion not only stood at the farm but in the ordinary course was walked round in the breeding season; but the Lord President said he thought the Case that applied to the profits of a stallion was Case I. (4): Lord Johnston said (5): "That would appear comprehensive enough to cover the appellant's adventure in the service for profit or gain of other owners' mares. . . . . I do not think that recourse to this Case"—that is Case VI.—"is required for the inclusion under the First Case is clear." Lord Mackenzie said (6): "It appears to me that [the case] directly falls under the First Case of Sch. D, r. 1." So I should have thought, and I confess myself that I should have thought it unnecessary to refer to Case VI. at all. When the judgment came to be given by Lord Buckmaster (1), he held that the case was one of fact and drew no distinction between Case I. and Case VI. Then we come to *Carlisle and Silloth Golf Club* v. *Smith.* (2) That was an appeal from Hamilton J. (3), who held that the club was carrying on an enterprise which was beyond the scope of the ordinary functions of the club, and as to which it was possible to keep separate accounts so as to ascertain whether there were any profits, and that any profits derived from the visitors' green fees were therefore taxable under Sch. D of the Income Tax Act, 1842, Case I. or Case VI. Buckley L.J. in his judgment said (4): "If other conditions therefore are satisfied the club are, I think, assessable under the first rule" (he means the First Case) "of Sch. D. But as I have already said, it is, I think, unnecessary to determine whether that is so or not, for if it were not a 'concern in the nature of trade,' yet, other things being satisfied, the club would be assessable under the sixth rule." The importance of that reservation, "other conditions being satisfied," is very great.

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(1) [1923] 2 K. B. 447.
(2) Ibid. 454.
(3) (1917) 7 Tax Cas. 99.
(4) (1917) 7 Tax Cas. 102.
(5) Ibid. 104.
(6) Ibid. 105.

There are two good illustrations of what can be brought under Case VI. and where Case VI. is of importance; one is in *Coman* v. *Governors of the Rotunda Hospital, Dublin* (5), where, in his well known judgment, Lord Birkenhead L.C. shows that you may have to go to Case VI. in matters which fall properly within Sch. D. He says (6): "The question is whether the utilisation of these rooms and the provision of facilities and services in the way set out in the case, yielding, as it does, a regular annual income to the respondents above the letting value as a property and over and above the profit assessable to Sch. A, amounts either to the carrying on of a trade or business under Case 1 of Sch. D, or to a profitable activity which is assessable under Case 6 of that schedule. . . . It is true that the Special Commissioners have not expressly stated whether they found that Case 1 or Case 6 applied, but having regard to the contention of the Surveyor of Taxes, as set out in para. 6 of the case stated, I think it is clear that they were of opinion that the respondents were in fact carrying on a business, and intended so to hold. The point, however, is not of great moment, as in my opinion one or other of these cases applies, and the assessments if not valid under Case 1 could in any case be supported under Case 6," and he gives illustrations of what does fall under Case VI.

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(1) (1917) 7 Tax Cas. 105, 106; [1919] A. C. 463, 466.

(2) [1913] 3 K. B. 75.

(3) [1912] 2 K. B. 177.

(4) [1913] 3 K. B. 75, 81.

(5) [1921] 1 A. C. 1.

(6) [1921] 1 A. C. 13.

In my view a close examination of all these cases brings us to this point, that although it is quite unnecessary to lay down any rigid rule which is to circumscribe Case VI. in contradistinction to Case I., and although you may have cases which fall properly within Sch. D and in respect of which Case VI. may be usefully applied, yet if you are to apply Case VI. it must be in respect of something to which Sch. D applies; it must be something in the nature of profits or gains in contradistinction to capital, and I think that the words which are used by Atkin L.J. in *Cooper* v. *Stubbs* (1), to which I have already referred, are of assistance here, for he made it plain that he regarded Case VI. as applicable to something which was in the nature of revenue or income as opposed to capital. I do not desire to go further than that, which seems to be sufficient for this case. It appears to me, therefore, that in the present case, in which we have anything in the nature of trade negatived, and in which the Commissioners have applied themselves to the fact that there were two properties purchased, and yet negative trade, we can hold and only hold that they meant to say that this was a matter on which there had been a capital accretion and that that capital accretion, whatever else might fall within Case VI., does not fall within Case VI., and is not taxable for the reason that it is not a source, and by reason of the interpretation given by Atkin L.J. in *Cooper* v. *Stubbs* (2), and the summary of it to which I have referred given by Rowlatt J. in *Ryall* v.

(1) [1925] 2 K. B. 753.

(2) [1925] 2 K. B. 773.

Hoare (1), it appears to me that this single profit of 603*l.* 10*s.* cannot form the subject of an assessment.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

LAWRENCE L.J. I agree, and will only add a few words of my own.

In the original Case the Commissioners found that the respondent acquired the property or interest in the property in question with the sole object of turning it over again at a profit, and that the respondent at no time had any intention of holding the property or interest in the property as an investment. The learned judge, and I think rightly, considered that that finding left it doubtful whether the Commissioners had intended to find that the transaction was one of trade, as defined by the Act. Now, the definition of "trade" in the Act, s. 237, is this: "'Trade' includes every trade, manufacture, adventure or concern in the nature of trade." The learned judge, therefore, sent back the Case to the Commissioners, and in the Supplemental Case the Commissioners found that the transaction in question was not a concern in the nature of trade. Sir Boyd Merriman admitted that, in view of the decision in *Cooper* v. *Stubbs* (2), he could not in this Court contend that that finding was not a finding of fact, and that therefore he could not ask this Court to disturb that finding, though he desired to reserve the point if the case went to the House of Lords. Now, the finding of the Commissioners having stripped the transaction in question of all the attributes of an adventure in the nature of trade, Rowlatt J. came to the conclusion that all that was left was an isolated transaction of purchase and re-sale of an interest in real estate or property, and that the profit resulting did not fall within the words of Case VI.—"any annual profit or gains."

On the whole, though not without some hesitation, I have come to the conclusion that the learned judge was right. Speaking for myself, I have the greatest difficulty in seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction ejusdem generis with such an adventure and therefore fall within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade, in my opinion, would be required to make it a transaction ejusdem generis with such an adventure. It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property. If in such transaction as we have here the idea of an adventure in the nature of trade is negatived, I find it difficult to visualize any source of income, or to appreciate how such a transaction can properly be said to have been entered into for the purpose of producing income or revenue.

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(1) [1923] 2 K. B. 447.

(2) [1925] 2 K. B. 753.

Now there are many cases, of course, in which a case not falling within Case I. may well fall within Case VI. *Cooper* v. *Stubbs* (1) furnishes an example. In all of those cases there was some element analogous to trade and the distinction which seems to me to exist between those cases and the present one is that here we have an isolated transaction of a purchase and re-sale, and not a transaction or a series of transactions which could properly be said to have been entered into for the purpose of producing revenue and income.

For these reasons, although I fully realize that the question is a difficult one, I have come to the conclusion that the learned judge was right and that this appeal fails.

SLESSER L.J. I agree. Although this appeal has been argued at great length, in the end it really resolves itself into the question of what the Commissioners, who have twice considered this matter, have actually found. As has been pointed out by my Lord, in the event, when the Case was finally sent back to them they found, in terms, that this was not a concern in the nature of trade, and, whatever ambiguity there might have been in their finding on the first occasion

(1) [1925] 2 K. B. 753.

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that the transaction was carried on with the sole object of turning it over again at a profit, those words must now be read in conjunction with the express finding that this transaction was not carried on as a concern in the nature of trade. In those circumstances, once it is established, that there is nothing here in the nature of trade, then the question arises, what is really the nature of the transaction, and, as my Lord has said, and I agree, it must come to this, that it is in effect and in reality a capital accretion; there is no taxable source of income or revenue to come within Sch. D at all. I adopt the words of Rowlatt J. in *Ryall* v. *Hoare* (1), where he distinguishes between the fruit which might be caught under Case VI. and the root which would come within Sch. D as something taxable. Here, as it seems to me, we have no root from which this fruit may come. As was said in the *Hudson's Bay* case (2) by the Master of the Rolls, the landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does it as owner, and not as a land speculator. Here it appears upon the finding that there was no concern in the nature of trade. What was done here was done not in the nature of trade, but as owner and not by way of profitable income. I think that the findings of the Commissioners really determine the matter, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Wansey, Stammers & Co., for D. & D. Carruthers, Kilmarnock.*

(1) [1923] 2 K. B. 447, 454.

(2) 5 Tax Cas. 424.

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SALISBURY HOUSE ESTATE, LIMITED *v.* FRY (INSPECTOR OF TAXES).

Revenue—Income Tax—Letting of Offices—Assessment on Land—Cleaning, Lighting and Heating Services supplied by Landlord—Trade carried on by Landlord—Assessment in Respect of Profits of Trade—Claim to include Rents in Assessment in Respect of Trade, making Allowance for Tax paid on Land—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 1, *Sch. A, No. VII., r.* 4; *Sch. D, Case I.*

A company formed to acquire, manage and deal with a block of buildings let out offices to tenants, but it retained the hall, staircases and corridors which the tenants used in common and provided a staff to operate the lifts and to act as porters and watch and protect the buildings. The leases or tenancy agreements relating to the sets of offices created the ordinary relation of landlord and tenant between the Company and each tenant; but they contained provisions enabling the tenants, if they wished, to have heating and cleaning provided by the Company on making additional payments and obliged them to take their electric lighting through the Company, which received a small commission on current consumed. For each of the four years ending April 5, 1925, 1926, 1927 and 1928, the Company was assessed under Sch. A to income tax on the gross value of the buildings as appearing in the Valuation List under the Valuation (Metropolis) Act, 1869. The Company admitted its liability to be assessed in respect of its profits from the services supplied to the tenants under Sch. D, but the Crown claimed in making the assessments under Sch. D to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Sch. A:—

Held (reversing the decision of Rowlatt J.), (1.) that the facts found by the Commissioners for the Special Purposes of Income Tax gave no ground for treating the letting of offices as part of the trade carried on by the Company, and that the rents were profits arising from the ownership of land, in respect of which the assessment under Sch. A was exhaustive; and (2.) that, in any case, there was no ground for making an allowance in respect of the tax assessed and paid under Sch. A in making an assessment under Sch. D.

Dictum in *Rosyth Building and Estates Co.* v. *Rogers* (1921) 8 Tax Cas. 11, 15 not followed.

Coman v. *Governors of Rotunda Hospital, Dublin* [1921] 1 A. C. 1 distinguished.

APPEAL from a decision of Rowlatt J. on a case stated by the Special Commissioners of Income Tax substantially in the following terms:—

At a meeting of the Commissioners for the Special Purposes of Income Tax held at York House, Kingsway, London, on

February 21, 1928, Salisbury House Estate, Ld., appealed against assessments made upon it under Sch. D of the Income Tax Acts for the four years ended April 5, 1928, in the sums of 16,822*l.*, 18,585*l.*, 20,344*l.*, and 20,453*l.* respectively by the Additional Commissioners of Income Tax for the City of London.

The Company was incorporated on January 7, 1902, to take over some land with a block of buildings upon it in the City of London, known as Salisbury House. Salisbury House was at the time in course of erection or had been recently completed, and the object for which the Company was formed was to hold the same and let it out as offices and turn it to account in any way which might be possible or expedient.

The Company has since 1902 held, maintained, let out and managed Salisbury House as contemplated at its inception. It has not acquired, managed or dealt in any other property.

Salisbury House has a very large floor space, and contains some 800 rooms, and these rooms have been let out by the Company to some 200 tenants as offices, singly or in suites, which may or may not be self-contained. The building itself is of nine floors and contains seven lifts and several entrances. The Company provided and operates the lifts, and also provides a uniformed staff of twenty-five men for this purpose, and to act as porters and watch and protect the building. There is also a staff of sixty-one cleaners. The halls, corridors, and staircases of the building are lighted and kept clean by the Company, and the building is under the care of a housekeeper, whose duty it is to supervise the staff, to prevent the intrusion of unauthorized persons, to take in letters for the tenants, and distribute the same, and to see that the building is locked up and safe at night. There are a few radiators in the passages, which are provided by the Company for heating purposes. The Company is rated as occupier. It has retained an office for its own use in the building. It has a board of directors, a secretary, and a clerical staff of three persons. It maintains a share register, holds meetings of directors and shareholders and management committee, and distributes

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dividends in the manner usual in the case of a limited company.

At the time of the appeal the rooms in Salisbury House had been let out subject to the arrangements made by the Company as indicated above for the whole building, under seventy-eight leases, generally for periods of from three to twenty-one years, eighty-nine tenancy agreements for shorter periods, and twenty-six tenancies by letter. The Company does not usually grant leases for more than twenty-one years, but it has granted one lease of a part of the premises for a term of seventy-eight years, and another for a term of twenty-eight years. The rents agreed upon had been fixed in all cases by having regard to the accommodation provided according to a general scale which takes account of the floor space and situations of the offices let. In no case were offices let furnished. A standard form of lease or agreement, which permits of modifications in certain respects as indicated hereunder, has been used by the Company, and under this form additional rents or charges are made for services provided by the Company beyond the rent for the rooms themselves.

A form representing the ordinary tenancy created was added to the Case. It was an agreement for letting offices for a term at a rent, and contained the usual covenants appropriate to such a tenancy agreement, as well as certain special provisions, the effect of which is hereafter noted.

The following notes were given in explanation of various paragraphs in the form :—

(*a*) The lavatories in the building are, as appears from the form, let out and used in common.

(*b*) The "additional rent" of 1*s.* 3*d.* a day for each fire lighted is optional. Tenants are not required to have fires, and if they choose they may supply (and in some cases have supplied) themselves with wood fires or electric heating.

(*c*) Though a charge is made for cleaning, this in practice is also optional, and tenants may make their own arrangements to clean their own offices. They are not obliged to have their offices cleaned by the Company, and there are some who do not, but if a tenant requires his office cleaned the Company supplies the cleaners. No charge is made by the Company for cleaning if it does not do the cleaning.

(*d*) The "additional rent" for the cost of lighting the halls, corridors and staircases is a common charge apportioned as near as may be between the various tenants.

(*e*) With reference to the covenant by the tenant to procure electric light from the Company or its assigns, it was stated that the entire supply of electric lighting for the premises is taken from one electric lighting company, and that the Company receives from it a small commission on the price of the current consumed on the premises. This electric lighting company is the only company supplying the neighbourhood with current. The Company has never nominated the electric lighting company—it has had no choice in the matter. The tenants pay for electric current consumed by them (whether for light or heating) according to meters in their offices.

Although tenants are not required to keep their windows clean, the Company makes arrangements with a separate contractor to clean windows for those who so desire, and it makes a profit out of so doing.

The Company does not provide heating apparatus for its tenants. The Company did on one occasion provide a central heating installation for an important tenant, but the agreement under a special term of which this heating was installed became obsolete before the war.

The Company provides no tenant's fixtures. It is possible upon occasion that such fixtures as partitions or divisions of floor space and counters may have been left behind by previous tenants and included in subsequent lettings, but, apart from these, it has not supplied landlord's fixtures.

Salisbury House was assessed to income tax under Sch. A upon the gross value as appearing in the Valuation List, in accordance with the Valuation (Metropolis) Act, 1869, s. 45. The value so fixed in 1925, when the last valuation was made, was 47,786*l.* The assessments in accordance with Sch. A, No. VII., r. 8 (*c*), have been made upon the Company as

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landlords and the tax due upon such assessments demanded and paid by the Company.

A part of the ground floor of the building had been let on terms that the tenants (a bank) paid the rates in respect of the premises occupied by them rated gross at 3131*l.*

The Company admitted at the hearing that it is liable to be assessed under Sch. D of the Income Tax Act upon any profit which it derives from Salisbury House tenants outside the mere rents for the offices which are let to the tenants, so far as such profits may be described as resulting from a trade. In accordance with its admission it put forward a computation, showing a profit amounting to 4189*l.* 9*s.* 4*d.* for the year to December 25, 1925, as follows :—

Sch. D. Salisbury House Estate, Ld., 1926–27.

Net profit as per Profit and Loss Accounts for year ended December 25, 1925 :—

	£	*s.*	*d.*	£	*s.*	*d.*
Interest	601	11	9			
Cleaning	2225	10	9			
Firing	2637	6	10			
Tenants' Sundries	266	8	7			
Commission	233	10	1			
Transfer fees	0	12	6			
	5965	0	6			
Less : Lighting	122	15	3	5842	5	3
Deduct : Proportion of General Expenditure and Bad Debts which the Trading Income Bears to the Gross Income.				1652	15	11
				£4189	9	4

The Company similarly admitted that its assessable profits under Sch. D for the two previous years arrived at on the same basis were 2997*l.* and 3385*l.* respectively.

For the purpose of the assessments appealed against the profits of the Company were computed by taking the total of its receipts from all sources, including the rents received by it from the lettings of the rooms in Salisbury House and deducting therefrom its expenses and the amounts of the assessments under Sch. A made upon the Company in respect of the said premises.

On behalf of the Company it was contended: (1.) That the receipts of rents of offices were receipts arising from the ownership of land;

(2.) That receipts from lands were chargeable under Sch. A of the Income Tax Act and had been so charged in this case;

(3.) That the Company could not be assessed under Sch. D for any amount by which the assessments under Sch. A might be insufficient to cover the rents received by it;

(4.) That the rents received by the Company did not arise from any trade carried on by it;

(5.) That the assessments should be discharged.

On behalf of the Crown it was contended: (1.) That the Company was in respect of all its activities carrying on a trade in the United Kingdom;

(2.) That accordingly in computing its profits for the purposes of Sch. D all its receipts, including the receipts from rents, and all expenses should be taken into account and an allowance given for tax assessed under Sch. A;

(3.) That the assessments appealed against were correctly made and should be confirmed subject to some slight revision of the figures.

The assessments appealed against had been made in accordance with the Crown's contentions, and the amount thereof have (apart from the questions of principle involved) been agreed between the parties at the following amounts—namely: For the year ending April 5, 1925, 16,822*l.*; for the year ending April 5, 1926, 19,461*l.*; for the year ending April 5, 1927, 21,243*l.*; and for the year ending April 5, 1928, 20,445*l.*

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The Commissioners felt bound, following a previous decision of the Special Commissioners, and in deference to opinions expressed in the Court of Session in *Rosyth Building and Estates Co., Ld.* v. *Rogers* (1) and in the Court of Appeal in the recent case of *Attorney General* v. *Metropolitan Water Board* (2), to decide that the assessments under Sch. D were rightly made to include the amounts by which the total receipts of the Company (including its rents from offices) less expenses exceeded the Sch. A assessments. They accordingly confirmed the assessments appealed against in the amounts stated above.

The sole question upon which the opinion of the Court is desired is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessments as trade receipts of the Company for purposes of Case I of Sch. D, Income Tax Act, 1918.

Rowlatt J. said the question was whether the liability to taxation in respect of rents had been exhausted by the assessment under Sch. A. Tax under Sch. A is a tax on the property regarded as a subject-matter capable of earning profits by its use. Real property was always liable to tax under Sch. A and in no case could it be treated as liable under Sch. D. If the capacity to derive profits from the property was handed over at a rent, it still bore Sch. A tax. In that sense Sch. A exhausted the taxable nature of the property, but when the capacity of making profits by the use of the land came to be exploited, there was a new subject-matter of taxation which could be taxed under Sch. D. An example of this was when a person occupied a house and carried on a trade there. The more difficult class of case was when the accommodation of the property was used as the subject-matter of the trade. That was what happened when a person kept a hotel or let lodgings. The question then in this case is whether the Company merely handed over the property to the tenants or was using the whole building as a means of carrying on a trade analogous to the trade of a hotel keeper or a lodging-house keeper. It remained to consider the facts and findings

(1) 1921 S. C. 372; 8 Tax Cas. 11. (2) [1928] 1 K. B. 833.

of the Commissioners. The substance of the matter seemed to him (his Lordship) to be that the Company was maintaining de facto control of the building. It was retaining some of it in its hands, requiring the tenants to give up the keys every night, maintaining lifts with a staff of uniformed servants and a variety of other branches of services which it offered to the tenants. Could it be said that it was wrong to treat that as carrying on a business analogous to that of letting unfurnished rooms? He thought not, and he must take the Commissioners as having looked at it in that way. Therefore the appeal must be dismissed.

Salisbury House Estate, Ld., appealed.

Latter K.C., *Needham K.C.* and *Cyril King* for the appellants. The profits arising from land are taxable in one way only—namely, under Sch. A of the Income Tax Act, 1918. That Schedule cannot be disregarded and the profits taxed under Sch. D. By s. 1 of the Act income tax is charged on "all property, profits or gains respectively described or comprised in the Schedules." Sch. A deals with the tax "in respect of the property in all lands, tenements, hereditaments and heritages." The property in this case being in the Administrative County of London the valuation for income tax purposes is made under the Valuation (Metropolis) Act, 1869, and not under the Rules applicable to Sch. A. By s. 45 of that Act the Valuation List for the time being in force is to be conclusive evidence of the gross value, and in s. 4 "gross value" is defined as "the annual rent which a tenant might reasonably be expected . . . . to pay . . . . if the tenant undertook to pay all usual tenants' rates and taxes . . . . and if the landlord undertook to bear the cost of the repairs and insurance." Here the landlords were assessed on this gross value under r. 8 (*c*) of No. VII. of Sch. A and cannot be taxable any further in respect of the rents received. There is only one charge on land and it is the assessment under Sch. A: *Rossdale* v. *Fryer*. (1) "The very terms which define the subject-matter of Sch. D exclude from it the subject-matters which fall within Sch. A": per Hamilton J. in *Hill* v. *Gregory* (1); and see also *Back* v. *Daniels* (2) and *Collyer* v. *Hoare & Co.* (3) In *Rosyth Building and Estates Co.* v. *Rogers* (4) the attention of the Court was not drawn to the opening words of Sch. D, which exclude from the charge under that Schedule profits and gains charged under other Schedules. It was not correct to say that the Crown has an option to tax under Sch. A or Sch. D. The charge under Sch. A is compulsory in reference to lands. The Crown are seeking to assess under Sch. D in respect of the profits of a trade in which rents are included on the ground that the appellants carry on a trade in letting offices. The course sought to be adopted runs contrary to what was said by the Lord President in *Revell* v. *Edinburgh Life Insurance Co.* (5)

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(1) [1922] 2 K. B. 303, 311.

[LORD HANWORTH M.R. referred to *London County Council* v. *Attorney-General.* (6)]

Attorney-General v. *Metropolitan Water Board* (7) really has no bearing on the present case, though reliance was placed on it by the Commissioners. It is impossible to treat rents as the profits of a trade under Sch. D when the relation of landlord and tenant exists and the landlord has parted with the entire possession for a rent so that the tenant is the occupier. In *Coman* v. *Governors of Rotunda Hospital, Dublin* (8), there was no letting creating the relation of landlord and tenant. Here the entire possession is vested in the tenant. The tenancy agreement here is almost identical in form with that in *Reg.* v. *St. George's Union Assessment Committee* (9), where it was held that the relation of landlord and tenant existed: see also *Edinburgh Southern Cemetery Co.* v. *Kinmont.* (10) It is true that the tenants have to hand the keys of their offices to the porter at night, but the porter must be deemed their agent for the purpose of holding the keys.

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(1) [1912] 2 K. B. 61, 70.
(2) [1924] 2 K. B. 432, 447; [1925] 1 K. B. 526.
(3) (1928) 7 Annotated Tax Cas. 332.
(4) 8 Tax Cas. 11.
(5) (1906) 5 Tax Cas. 221, 226.
(6) [1901] A. C. 26, 32.
(7) [1928] 1 K. B. 833.
(8) [1921] 1 A. C. 1.
(9) (1871) L. R. 7 Q. B. 90.
(10) (1889) 2 Tax Cas. 516.

Further, the Crown are, in claiming to tax rents under Sch. D, proposing to make an allowance in respect of tax already paid under Sch. A. There is nothing in the Act to permit of such an allowance.

Sir W. Jowitt A.-G. and *R. P. Hills* for the respondent. The first question is whether the appellant company was carrying on a trade so as to be chargeable with tax under r. 1 of Sch. D. The facts found by the Commissioners show that a trade was being carried on, and if so they are assessed under Sch. D on the profits of the trade. Part of these profits are the rents. It is said that the appellants cannot be made to pay tax on these under Sch. D, because they have already paid tax under Sch. A. But the Crown is not seeking to tax the rents as rents but as profits of a trade, and to avoid double taxation it is proposed to make an allowance in respect of the tax paid under Sch. A. In *Rosyth Building and Estates Co.* v. *Rogers* (1) the Lord President said: "It is well settled that it is for the Crown to choose in which capacity the Company shall be charged, as property or investment owner on the one hand, or as trader conducting a business on the other hand." Here the Crown choose to assess under Sch. D. Moreover that case is directly in point as showing that rents can be included in profits for the purpose of an assessment under Sch. D. *Coman* v. *Governors of Rotunda Hospital, Dublin* (2) is to the same effect. The question whether the assessment under Sch. A was exhaustive so as to prevent an assessment under Sch. D was there clearly raised, and the argument that there was no room for an assessment under Sch. D negatived.

[LAWRENCE L.J. There the Governors remained in occupation, but here the Company is not in occupation of the property. The tenants are the sole occupiers.]

It is a fallacy to consider the question here as if it turned on whether or not possession was given to the tenant. There may be an annual value arising from land, and superimposed on that a utilization of the land in such a way as to carry on a trade. The trade here is providing persons with office accommodation involving in part a demise and in part something less, and the supply of lighting, heating, and cleaning.

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(1) 1921 S. C. 372; 8 Tax Cas. 11, 15. (2) [1921] 1 A. C. 1.

[SLESSER L.J. Apart from the heating, lighting, and cleaning, is this not an ordinary tenancy agreement?]

When a real estate company is carrying on a trade, it is taxable under Sch. D, and this although part of the trade is to let out premises to which the Company has no right of entry: *Rosyth Building and Estates Co.* v. *Rogers.* (1) If there be a letting and no more, it may well be that it cannot be said that any trade is being carried on, but the present is a different case. It is not accurate to say that because Sch. A applies, Sch. D cannot. Thus it is well settled that Cases under a Schedule are not mutually exclusive: *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (2) It is difficult to see why the same should not apply to the different Schedules.

[LAWRENCE L.J. Here the Company has been assessed under Sch. A, and it is sought to super-add an assessment under Sch. D, giving credit for the tax paid under the Sch. A assessment. What ground is there for this?]

The ground is that the Company is carrying on a trade: compare *St. Andrew's Hospital, Northampton* v. *Shearsmith* (3), which shows that the annual value assessed under Sch. A can be deducted: see also *Wylie* v. *Eccott.* (4)

[LAWRENCE L.J. The deduction in the *St. Andrew's Hospital* case (3) was made under r. 5 of the Rules applicable to Cases I. and II. of Sch. D.]

The present Company has been carrying on a trade, and the rents are part of the trade receipts and liable to assessment under Sch. D accordingly. The letting of the offices is just as much part of that trade as that involved in supplying light, heat, and cleaning to the tenants. The whole is a trade with the tenants, and Salisbury House is used for the purpose of the trade. The tax under Sch. A is on annual value and not rents, and any use made of the premises not covered by the assessment under Sch. A is taxable as a trade item under Sch. D: *Coman* v. *Governors of Rotunda Hospital, Dublin* (1); and see *Campbell* v. *Inland Revenue.* (2) So in *Usher's Wiltshire Brewery* v. *Bruce* (3), where licensed houses were let by the Brewery Company to tied tenants at less than the annual value, the Company was able to carry in the loss to debit of the profits of the business assessed under Sch. D. If this can be done in respect of a loss, it is contended that the same can be done in respect of an excess of rents over annual value.

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(1) 8 Tax Cas. 11.

(2) [1911] 2 K. B. 577, 591; [1912] 2 K. B. 41, 51; [1913] A. C. 610.

(3) (1887) 19 Q. B. D. 624.

(4) (1912) 6 Tax Cas. 128.

[LORD HANWORTH M.R. There the loss was suffered on a commercial outlay for the benefit of the brewery business, so as to secure tied tenants.]

In *Usher's* case (4) the Court really applied *Smith* v. *Lion Brewery Co.*, (5), as was pointed out by Lord Loreburn (4), who had delivered a dissenting judgment in *Smith* v. *Lion Brewery Co.* (5)

[LORD HANWORTH M.R. In *Usher's* case (3) the Brewery Company was trading in beer, and was letting the licensed properties at uneconomic rents to secure a market for the beer.]

Yes, but it is an authority which disposes of the argument that regard cannot be had to an expenditure on property taxed under Sch. A for the purpose of an assessment under Sch. D. Surely the same applies to receipts, so that the rents can be included in the assessment under Sch. D where, as here, the landlord is carrying on a trade.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It is, to my mind, a plain case. I agree with the law laid down by Rowlatt J. He is a master of this branch of the law, and he seems to have laid down the right principles of law, in clear and unequivocal terms; he has, however, to my mind, applied

(1) [1921] 1 A. C. 1.
(2) (1879) 1 Tax Cas. 234.
(3) [1915] A. C. 433.
(4) Ibid. 433, 444.
(5) [1911] A. C. 150.

that law to a set of facts other than those with which he was presented by the Commissioners. At the same time I am grateful to him for a very clear exposition of the law which I intend to follow. That brings me to the necessity of stating shortly the facts of this case.

This Company owns a block of buildings in the City of London, known as Salisbury House, and for a number of years it has let out and managed Salisbury House as was contemplated in the memorandum of association, which provided that the Company was to acquire land and buildings and, in particular, to alter, improve, maintain and let out flats. Now the Company lets out these premises to a great number of tenants. There are no less than seventy-eight leases which are for terms of from three to twenty-one years; there are eighty-nine tenancy agreements for shorter periods, and there are twenty-six tenancies which are created by letter and not by any formal agreement; the Company has in one case granted a lease for a term of seventy-eight years, and in another case a lease for twenty-eight years. The rents are all agreed on the basis of the accommodation provided, and the situations of the offices let; all the offices are let unfurnished. We have the standard agreement or deed under which the tenancies are created before us. That form contains the usual provisions. The Company, as landlords, are to let and the tenant is to take; the tenant gets the exclusive possession of the premises and pays a rent. He is not to carry on a hazardous trade; the landlords are to keep the outside of the premises in repair, and painted, and are to pay all the existing and future rates, taxes, and charges. The tenant, on the other hand, is to pay for certain advantages which he may receive and which are provided by the Company, such as coals if he uses fires and the current consumed by him for either lighting or heating. The landlords have a right to re-enter for non-payment of rent, and there is the usual provision that during the last three months of the tenancy the landlords may go in for the purpose of putting up a notice board or placard.

I have dealt at perhaps unnecessary length with the terms of this form of lease, to emphasize the fact that a tenancy is created; a demise of the premises is granted on terms which deprive the landlord of the right to go in and which give the tenant exclusive possession. One or two provisions are said to militate against that view, such as that the keys of the premises are to be left each night with the caretaker. That, I suppose, is to permit access in the event of a burst water pipe or a fire, to secure the safety of the premises below, or for some other useful purpose. The mere fact that those keys are surrendered each night does not, to my mind, detract from the exclusive possession which is given during the term created, whether by the lease or the tenancy agreement. Access to these premises is provided by means of a common staircase, and there are also lavatories in the building which are used in common. I cannot see that that feature in any way detracts from the exclusiveness of the tenure of the tenants. In respect of the services rendered by the landlord in cleaning the premises and supplying fires and electric light, a considerable sum is collected by the Salisbury House Company, and it makes some profit upon those services—a profit which must be a profit or gain arising from a trade. The Company is assessed and ready to pay upon the profits of that trade.

Now it is said by the Crown that the whole business that is carried on by the Salisbury House Company ought to be treated as one single business, and Rowlatt J. has accepted that view; he thinks that the Company is, so to speak, carrying on an hotel, and apparently he thinks that the Commissioners so found; he is reluctant to disagree with the finding of the Commissioners, but at any rate his view of the facts is that they show that a business akin to that of a hotel keeper or to that which was carried on in the *Rotunda* case (1) was being carried on by the Salisbury House Company. I cannot accept that view of the facts stated by the Commissioners. The Commissioners say this: "We, the Commissioners, who heard the appeal felt bound, following a previous decision of the Special Commissioners and in deference to opinions expressed in the Court of Session in the case of the *Rosyth*

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(1) [1921] 1 A. C. 1.

Building and Estates Co. (1) and in the Court of Appeal in the recent case of the *Metropolitan Water Board* (2) to decide that the assessments under Sch. D were rightly made to include the amounts by which the total receipts of the Company (including its rents from offices) less expenses, exceeded the Sch. A assessments. We accordingly confirm the assessments appealed against in the amounts stated in clause 11 hereof." Now what were those sums? Those were assessments arrived at by treating the whole of the business as one trade and the Sch. A assessments as only assessments pro tanto. The total profit rentals exceeded the Sch. A assessments, and it was said therefore that the whole of the profits were to be treated as profits of the trade, and assessed accordingly, an allowance being made in respect of what had been paid under Sch. A. In clause 14 the Commissioners go on to say: "The sole question upon which the opinion of the Court is desired is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessments as trade receipts of the Company for purposes of Case I. of Sch. D, Income Tax Act, 1918." I hold that those words mean that the question is whether or not the Commissioners were right in holding themselves bound by the decision in the Court of Session in the *Rosyth Building and Estates Co.* case. (1) In that case there was an assessment under Sch. D, and because the decision of the Court of Session was that Sch. D was the right Schedule, the Commissioners followed it. Rowlatt J. has stated the law in terms which, to my mind, are not consistent with what was said in the Court of Session; but he has concluded the matter in accordance with the decision of the Commissioners, because he found as a fact that the totality of these activities of Salisbury House was a trade.

I have some difficulty in following the principles which have been adopted by the Commissioners, I think, somewhat unwillingly. Income tax is imposed by s. 1 of the Act of 1918 if and when there is an annual Act bringing that section into operation. Its terms are: "Where any Act enacts that

(1) 8 Tax Cas. 11. (2) [1928] 1 K. B. 833.

income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D, and E, contained in the First Schedule to this Act and in accordance with the rules respectively applicable to those Schedules." The reason for splitting up the tax into various Schedules is to disintegrate the nature of the property and sources from which profits and gains are obtained. Now Sch. A is the Schedule which deals with land, and it provides that " Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof," and under No. I. the " General Rule for estimating the annual value of lands . . . ." "the annual value shall be understood to be :— . . . . (2.) if they are not let at a rack rent so fixed, then the rack rent at which they are worth to be let by the year." Finally, under Sch. A, No. VII., r. 4, it is laid down : " Tax under this Schedule shall be charged on all lands, tenements and hereditaments. . . . ." That imposes, therefore, a clear direction that the tax under Sch. A is to be charged on all lands, tenements and hereditaments.

Now, it appears to me that in respect of this property which is owned by the Salisbury House Company, and which is demised by them to their tenants, the clear direction of the Income Tax Act applies, and that the tax must be assessed under Sch. A. It is said, however, that if Sch. D is applied some deduction can be made in respect of tax which has been paid under Sch. A. To my mind that is a confusion. Tax must either be charged under Sch. A on the property, or it must be charged under Sch. D on the business carried on by the Company, as a totality. It was said in a judgment which holds its sway still, the judgment of Lord Macnaghten in *London County Council* v. *Attorney-General* (1), when speaking of these various Schedules, that " In every case the tax is a tax on income, whatever may be the standard by which the income is measured. It is a tax on 'profits or gains' in the case

(1) [1901] A. C. 26, 36.

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of duties chargeable under Schedule A and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge." Now in the light which that judgment gives, it seems clear to me that on the facts found by the Commissioners, the income tax falls to be estimated under Sch. A, and that what is to be estimated is the tax upon the profits or gains arising out of the lands and tenements which are owned and let by this Company. And I think it is wrong to say that the Crown can tax the Company in part under Sch. A, and, not satisfied with that, tax again the totality of the profits, including the rents, under Sch. D, and then without any authority at all make a deduction of so much as has been paid under Sch. A. There is one rule and one rule only which permits a deduction of the tax under Sch. A; and it is in the Rules applicable to Cases I. and II. of Sch. D. The Crown is entitled and indeed compelled to deduct from the profits which are subjected to tax under Sch. D a sum which has been charged in respect of the premises where those profits are earned. Rule 5 says: "The computation of tax shall be made exclusive of the profits or gains arising from lands, tenements, hereditaments, or heritages occupied for the purpose of the trade or profession." In the present case it is sought to adopt some method of deduction quite independently of any authority to do so, and a plan has been followed for which, in my opinion, there is no warrant.

There are many cases where two businesses are being carried on. There may be, as was suggested in *Back* v. *Daniels* (1), a sale of certain produce of the land. In that case it was held that the respondents were assessable upon the profits arising from the occupation of land under Sch. B, but that having suffered tax under Sch. B they could not be taxed under Sch. D. Scrutton L.J. points out (2) that "When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing

(1) [1924] 2 K. B. 432; [1925] 1 K. B. 526. (2) [1925] 1 K. B. 544.

with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation." And here there is such a separate operation, so that in respect of the services rendered there are profits which fall to be assessed under Sch. D. Rowlatt J. has put the matter in this way in the present case: The tax under Sch. A "is a tax upon the property in the hereditament, that is to say, as Lord Atkinson said (1), 'upon its capacity to yield profit,' and that liability to tax, as I understand it, is firmly immanent in the subject-matter. Real property is always liable to Sch. A, and under no circumstances can you take it out of Sch. A—discard Sch. A and throw it into a Sch. D account, and treat it under Sch. D. I regard the Sch. A tax as attaching to property just like land tax does." In my judgment, that is quite accurate. Real property must be taxed under Sch. A, and unless there is a business being carried on, there can be no tax under Sch. D.

In the present case we have clear authority as to what is the nature of the lettings made by the Salisbury House Company. In *Reg.* v. *St. George's Union Assessment Committee* (2) it was decided that various sets of rooms occupied by tenants are separate rateable hereditaments, and ought to be separately assessed. That decision, to my mind, makes it plain that we cannot hold, as Rowlatt J. appears to have held, that the business carried on at Salisbury House is the business of an hotel proprietor. Again, in one or two other cases to which I will refer, it has been held that when taxation falls to be made under Sch. A, the subject-matter of that tax is excluded from the operation of Sch. D. Hamilton J. said in *Hill* v. *Gregory* (3): "The very terms which define the subject-matter of Schedule D exclude from it the subject-matters which fall within Schedule A." Here I think we have a case to which Sch. A plainly applies and not Sch. D, except in the matter of the services rendered to tenants to which I have already referred.

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(1) *Coman* v. *Governors of Rotunda Hospital, Dublin* [1921] 1 A. C. 1, 28.

(2) (1871) L. R. 7 Q. B. 90.

(3) [1912] 2 K. B. 61, 70.

The authority which is relied upon by the Crown is the *Rosyth Building and Estates Co.* case. (1) I wish to speak, of course, with respect of that decision, but I am not sure that I entirely follow it. The point that had to be considered was whether or not the Company was entitled to the relief now given under s. 33 of the Income Tax Act. The Lord President said (2): "It is well settled that it is for the Crown to choose in which capacity the Company shall be charged, as property or investment owner on the one hand, or as trader conducting a business on the other hand." If those words are to be taken simpliciter, I confess I do not agree with them, but I feel sure that I must have misunderstood them. I have asked the Attorney-General for the authority which justifies the statement that the Crown can select under which Schedule they will tax the subject. He has not produced any authority, but, at the same time, he relied upon those words as showing that it was possible for the Crown to choose whether they should tax under Sch. A or Sch. D, and that, to my mind, in defiance of the plain terms of the Schedules and the rules to which I have referred. But in the *Rosyth* case (1) there was some question whether there was only a profit derived from land and hereditaments, or whether a business was being carried on, and the Lord President said (3): "It may in the ordinary case be difficult to determine the point at which mere ownership of heritage passes into the commercial administration by an owning trader, but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts, and it is solved in the present case in favour of the Crown because it is common ground that the Appellants' Company is a business." That may explain some of the observations made in the case, but I find it quite impossible to accept it as an authority for saying that the Crown have a right at their own volition to say whether they will tax the subject under Sch. A or Sch. D. In the present case the facts found by the Commissioners do not seem to me to amount to a finding that there is one entire business including the dealing with the land; and I think that the facts clearly indicate a subject for assessment under Sch. A. When once that has been determined upon the facts, Sch. A applies and no more, and the Crown cannot superimpose a further tax under Sch. D upon a subject-matter already taxed under Sch. A merely because there is a margin of profits upon which the Crown would like to recover tax, if entitled to do so.

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(1) 8 Tax Cas. 11.

(2) 8 Tax Cas. 15.

(3) 8 Tax Cas. 17.

I will add a word or two upon two cases which, to my mind, are illustrative of a different point. In the *St. Andrew's Hospital* case (1) the governors of a hospital carried on a business of receiving paying patients and were held liable to pay in respect of the profits so made. Again in that case an effort was made to rely on the mode and disposition of the profits as an argument for immunity from tax. That was held not valid, as it must have been in accordance with *Mersey Docks and Harbour Board* v. *Birkenhead Union Assessment Committee.* (2) It was a case in which a separate and integral business was being carried on apart from the business of the hospital. So, also, in the *Rotunda* case (3) a separate business was carried on—namely, the business of letting out rooms for entertainments—and in that case I think Lord Finlay puts the matter quite clearly (4): "The profits fall under Sch. D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors and consists in finding tenants and having the rooms so equipped as to be suitable for letting." Lord Shaw, in a word or two at the end of his judgment (5), says this: "If these views be sound, it follows that the profits of the entertaining business, to put the matter thus briefly, do not escape taxation under Sch. D because they are earned by a tax-payer who is the owner and occupant of buildings taxed under Sch. A." The divergence and distinction between what falls under Sch. A and Sch. D are, to my mind, made abundantly plain in that case.

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(1) 19 Q. B. D. 624.
(2) [1901] A. C. 175.
(3) [1921] 1 A. C. 1.
(4) Ibid. 18.
(5) [1921] 1 A. C. 39.

Here we have facts which show that the Salisbury House Company is a property owner. Being a property owner it must be taxed under Sch. A in respect of its profits and gains. Being taxable, as a property owner under Sch. A, it cannot have superimposed a further liability under another Schedule; but if and so far as, independently of that activity as a property owner, it is carrying on a separate business, as it does in the matter of the cleaning and supplying of fires and electricity, that business does fall to be taxed under Sch. D. Following the analogy of the *Rotunda* case (1); *Grove* v. *Young Men's Christian Association* (2); and *Religious Tract and Book Society of Scotland* v. *Forbes* (3), there is a separate business, and in respect of that it must pay tax under Sch. D, as it has agreed to do. I have applied the law as stated by Rowlatt J.; I do not dissent from him in any way in regard to the law, but I am quite unable to find on the facts presented to this Court that he was justified in holding that the business was not one of owning property which fell to be taxed under Sch. A, but a business of an hotel proprietor which fell to be taxed under a different Schedule.

For these reasons, the appeal must be allowed with costs.

LAWRENCE L.J. I agree. The sole question which the Commissioners have submitted for the consideration of the Court is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the Company for the purposes of Case I. of Sch. D of the Income Tax Act of 1918. The Commissioners have considered themselves compelled to hold that the rents so received ought to be included as trade receipts on the authority of the *Rosyth* case (4) and of the *Metropolitan Water Board* case. (5) Now, as regards the *Rosyth* case (1), the question which was there determined was one which arose under s. 14 of the Finance Act of 1915, which is now replaced by s. 33 of the Income Tax Act of 1918, for relief in respect of expenses of management disbursed by the Company as an Investment Company. The business of the Company consisted of owning property and erecting houses upon it, and it was held by the Court of Session to be an Investment Company within the provisions of that section. For the purposes of determining whether the Company was entitled to relief, the question was considered whether the investment business conducted by the Company was a trade or concern in the nature of trade falling within Case I. of Sch. D, or possibly whether the profits or gains derived by the Company fell to be assessed under Case VI. of that Schedule. Now, I agree with the Master of the Rolls that the grounds upon which that case was decided seem to involve an erroneous view of the effect of the Income Tax Acts in a case where tax has been imposed under Sch. A in respect of the ownership of the property, and where the landowner has at the same time become chargeable to income tax under Sch. D in respect of a separate trade carried on by him. The Lord President stated (2) that it is well settled that it is for the Crown to choose in which capacity the Company shall be charged, as property or investment owner on the one hand, or as a trader conducting a business on the other hand, and the view of the Lord President was that the Crown had an option on the one hand to tax such a Company as the owner of the property occupied by it under Sch. A, and then to tax the Company in respect of the profits or interests of the separate business carried on by it under Sch. D; or, on the other hand, to tax the Company entirely under Sch. D in respect of the whole of its undertaking as a trader carrying on a business in which the annual rents and profits arising from the property should be included in his profits and gains arising in respect of his trade and should accordingly be brought into charge under Sch. D. It seems to me that that

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(1) [1921] 1 A. C. 1.

(2) (1903) 4 Tax Cas. 613.

(3) (1896) 3 Tax Cas. 415.

(4) 8 Tax Cas. 11.

(5) [1928] 1 K. B. 833.

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(1) 8 Tax Cas. 11.

(2) 8 Tax Cas. 15.

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view is erroneous. The same reasoning was applied by Lord Mackenzie, and indeed in reading his judgment it seems to me that he considered that in such a case the true view was the rents and profits fell to be charged wholly under Sch. D. Lord Skerrington stated in plain terms that in order to sustain the Crown's contention in that case it was essential that the Crown should demonstrate that it would be entitled to make an assessment to income tax in respect of the rents and profits of the property under Sch. D, if they so wished. It is obvious from what I have said that the actual decision in that case has nothing to do with the point which we have to decide here, but the observations made in the course of the judgments to which I have referred do in my opinion afford valid ground for the Commissioners' determination in the present case. Now, disagreeing, as I do, with the reasoning of the Court of Session in that case, I think that the Commissioners were wrong in the conclusion at which they arrived. Rowlatt J., whilst recognizing the distinction between the case of a landowner deriving profit from letting his land at a higher rent than the annual value (which assessed value is treated as the measure of the tax under Sch. A) and the case of a landowner who is in occupation of his property and derives profits from the use of that property without parting with the legal ownership (such as an hotel proprietor or lodging-house keeper), has held that the present case falls within the latter and not the former category. I have the misfortune to differ from the learned judge in that respect. The Crown in the present case has taken a somewhat different line of argument. The Attorney-General has boldly contended that if a landowner lets his land in numerous parcels so as to make a business of such letting, and especially if at the same time he makes a profit out of his tenants by supplying them with conveniences such as lavatories, firing, lighting, etc., he is chargeable wholly under Sch. D both in respect of the rents which he receives and of the profits he derives from the supply of conveniences, and that if, as must be the case by virtue of r. 4 of No. VII. of Sch. A, he has been taxed under Sch. A in respect of the land which he owns the Crown would naturally not seek to impose a double taxation, but would allow the tax charged under Sch. A to be deducted from the tax payable under Sch. D. I cannot find any warrant in any authority binding upon this Court or in the Act for this contention. The Attorney-General relied on two cases as supporting his proposition—namely, the *Rotunda* case (1) and *Usher's* case. (2) Now, the *Rotunda* case (1) seems to me to draw a clear distinction between a landowner who leases or lets his land to tenants and derives a profit from the rents which he receives from them and the landowner who utilizes his land while retaining possession of it by hiring it out to be used by persons who do not take any estate or interest in the land itself. In the *Rotunda* case (1) concert and ball rooms were hired out to persons desirous of utilizing them for the purposes of musical or dancing entertainments, and the owners had equipped the rooms so as to make them available for those purposes. The owners in that case did not part with any estate in the land, and the real reason for the decision was that the services which the owners had rendered could not be regarded as mere incidents attached to the letting of the rooms themselves. Lord Atkinson said (3): "I do not think the services thus rendered can be regarded as mere incidents attached to the letting of the rooms themselves. What is let, paid for and used is the room plus the services as constituting one composite whole, for which money is paid, and is obtained from the general public. In my opinion, this letting is an 'adventure or concern in the nature of trade' within Case 1, r. 1, Sch. D, but, even if not, the profit and gains derived from it are assessable under Case 6 of that Schedule."

Now what are the facts in the present case? The Company owns a large building known as Salisbury House. According to the finding of the Commissioners it lets out offices in that building. Some of these offices are let on lease for terms of years varying from three to twenty-one years. In addition to that, there are eighty-nine tenancy agreements

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(1) [1921] 1 A. C. 1.

(2) [1915] A. C. 433.

(3) [1921] 1 A. C. 35.

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for shorter periods and twenty-six tenancies by letter, but in each case the Company parts with some estate in the property itself, and is playing the true part of a landowner by constituting the legal relationship of landlord and tenant. In these circumstances I think it is erroneous to say merely because there are such a number of leases and lettings that therefore the character of the undertaking of the Company changes from one of a landowner deriving his profit from letting his land to one of a trader making a trade profit consisting of the excess of the rents over the annual value of the property, as ascertained under Sch. A. Then does it make any difference because, besides owning and letting the land, the Company does that which under the Income Tax Acts is considered as the carrying on of a trade or an adventure in the nature of a trade, or something ejusdem generis, with a trade or such an adventure so as to come under Case VI. if it failed to come under Case I.? In the present case the activities of the Company consist of providing cleaning facilities and fuel for firing and rendering other services to the tenants who occupy the various offices which are let to them. The services so rendered result in a profit of over 4000*l.* a year; but these services are separate from the land-owning part of the Company's business, in which, as I have already stated, the relationship of landlord and tenant is created. It cannot be denied that under the leases which the Company has granted, and although I have not seen the tenancy agreements and the terms of the tenancies created by letters, I take it that the same applies to them, the Company would be committing a trespass by entering upon the property of their tenants except under the provisions of the leases or agreements. In certain events the Company has reserved to itself the right to enter upon the tenants' property; but, apart from that, the Company has parted with an estate or interest in the land and has vested the exclusive ownership during the term in the tenant.

Now in the case of the *Usher's Brewery Co.* (1) there were special facts which led the Court to come to the conclusion that the landowning part of the Company's business was a mere incident to the trade which the Brewery Company was carrying on. The trade in respect of which the profits or gains were being taxed under Sch. D was that of manufacturing and selling beer, and the evidence showed that the ownership of the tied houses and the letting of them at uneconomic rents was an incident of the Company's business in selling and marketing its beer. The facts, although special in one sense, were usual in the trade of a Brewery Company, in that it was merely incidental to such a trade that properties consisting of public-houses were acquired, held, sold and let. The same cannot be said of the present case. The Company here is a landowning company, and it derives its profits from leases granted to tenants, a position in which every landowner is placed, and I do not think that because the Company was formed for the purpose of acquiring and letting property and because the lettings were numerous, therefore it becomes a company carrying on a trade in respect of such lettings and the rents derived from such lettings are taxable under Sch. D. I agree with the Master of the Rolls that if a landowner is taxed under Sch. A in respect of the property which he owns and pays that tax on the annual value, there is no authority which justifies his being taxed in respect of the receipts in the shape of rents which he receives under any other Schedule, even though he may be a person who acquires the land for the purpose of letting it at a profit rental.

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(1) [1915] A. C. 433.

For these reasons I have come to the conclusion that the decision of the learned judge and also the determination of the Commissioners were erroneous, and that the appeal ought to be allowed.

SLESSER L.J. In this case the sole question for the opinion of the Court, as stated in clause 14 of the Case of the Commissioners, "is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the Company"; and in clause 12 the Commissioners say that "following a previous decision of the Special Commissioners and in deference to opinions expressed in the Court of Session in the case of the *Rosyth Building and Estates Co.* (1) and in the Court of Appeal in the recent case of the *Metropolitan Water Board* (2) " they confirm the assessments. That is the only reason given in the Case stated by the Commissioners for confirming the assessments appealed against.

It is contended on behalf of the Company substantially " that the receipts of rents and taxes of offices were receipts arising from the ownership of land " ; and on behalf of the Crown, " that the Company was in respect of all its activities carrying on a trade in the United Kingdom."

When we look at the nature of the actual transaction as set out in the Case it appears clear, in my judgment, that the transactions here were no more, and no less, than ordinary agreements between landlord and tenant. There are certain provisions with regard to the use and leaving of the keys, and as to porters, which are quite normal and usual, and which do nothing to prevent the property demised to each tenant from being a separate tenement, as in *Reg.* v. *St. George's Union Assessment Committee.* (3) There also what were almost the normal provisions with regard to the custody of the keys, the lighting of corridors, and that sort of thing, were present, and it was held that each set of rooms was a separate tenement, separately rateable ; and were the matter to stop there, I do not think that it could be doubted that this was an ordinary agreement of landlord and tenant. I will go further and say that were that the case, it would not be open to argument, that this was not an ordinary case of landlord and tenant falling to be taxed in the usual way under Sch. A. I do not propose to repeat the provisions of Sch. A, but it is clear that where there is an ordinary tenancy the tax is charged on the property in the lands and tenements under Sch. A ; but the way it is put for the Crown here is that this case should be distinguished from one where there is the ordinary liability to taxation under Sch. A.

First, it is said that the form of agreement is not an ordinary tenancy agreement, but contains provisions which take it

(1) 8 Tax Cas. 11.

(2) [1928] 1 K. B. 833.

(3) L. R. 7 Q. B. 90.

out of the category of ordinary agreements between landlord and tenant, on which the profits and gains of the landlord would fall to be taxed under Sch. A. Secondly, it is said that the matter is concluded by the *Rosyth Building and Estates Co.* case (1), and that whatever otherwise might be the view of the Court, it ought to follow the decision in that case. With regard to the first point on the facts it is important to distinguish between those mere incidents of an ordinary tenancy, such as the provisions as to the keys and porters, and those additions to the tenancy which are set out in para. 4 of the Case, whereby the landlord was able to, and did in fact, earn certain profits from the tenants with regard to charges for cleaning, lighting, and heating. As regards these further matters, which are not normally incidental to a tenancy, they are clearly severable from it and in no sense alter the legal relation of landlord and tenant. The acceptance of these services is optional to the tenant. I quote from para. 4 (*b*): "The 'additional rent' of 1*s*. 3*d*. a day for each fire lighted is optional. Tenants are not required to have fires, and if they choose they may supply (and in some cases have supplied) themselves with wood fires or electric heating"; and, similarly it is stated in para. 4 (*c*): "Though a charge is made for cleaning, this in practice is also optional, and tenants may make their own arrangements to clean their own offices." In other words being in the relation of tenant to landlord, the tenants may, if they please, make additional and separate contracts for these particular purposes. Some of them have made such agreements and certain profits have been earned in respect thereof, and on those profits the Company is paying the usual tax on gains under Sch. D. To that limited extent it is carrying on a trade. Now it is argued by the Attorney-General, as I understand his contention, that because that limited purpose of carrying on a trade is in some way necessarily connected with a pre-existing tenancy, therefore the whole undertaking of the Company is in the nature of a trade. I am unable to accept that view. In so far as there is a trade of lighting and heating, and cleaning, it is a separate

(1) 8 Tax Cas. 11.

matter; it need not be done at all. And we come back to the position that when the matter is properly examined in all its aspects, we have here the ordinary relation of landlord and tenant. Therefore, so far as the facts of the tenancies are concerned, there is the normal liability to pay tax under Sch. A. But then it is said, as I understand it, that the Company is carrying on the business of letting property. I cannot understand that contention. As it seems to me, every landlord who lets out habitually more than one house, or part of a house, may be said to be carrying on a business, and I would rely upon what Lord Loreburn said in *Smith* v. *Lion Brewery Co.* (1) in a passage which stands, whatever disagreement there may have been among their Lordships as to the general conclusions in that case: "you cannot, by saying that a man carries on the business of owning house property, shift the method of assessing that property for income tax from Sched. A to Sched. D."

So much, therefore, for this case, were it not for the decision in the *Rosyth Building and Estates Co.'s* case (2), which, however, can be differentiated from this case in several particulars. First, the question whether the tax was assessable under Sch. A or Sch. D only arose in connection with a claim for repayment, and the applicability of the Rules of Sch. D in that respect. Secondly, as my Lord has already pointed out, it is stated by the Lord President (3) that it was common ground in that case that the appellant Company was "a business, a land investment concern." That fact which may be important in the consideration of these cases did not arise here. I do not want to say more about that case than is absolutely necessary. I will only say that in my view we should not be so influenced by that case as to hold that in regard to what is an ordinary landlord and tenant's agreement, a separate tenancy for each of these sets of rooms, the landlord should be taxed otherwise than under Sch. A.

Finally, we were referred by the Attorney-General at some length to *Coman* v. *Governors of Rotunda Hospital*,

(1) [1911] A. C. 150, 155.

(2) 8 Tax Cas. 11.

(3) 8 Tax Cas. 17.

Dublin. (1) That was a case where admittedly bare rooms were not let, as here, under an ordinary tenancy agreement. The rooms were let for the express purpose of carrying on entertainments, and revenue was derived therefrom. The Governors of the Hospital let out certain rooms contiguous to the Hospital for entertainments for various periods, and when we come to examine the speeches of the noble Lords in that case, so far from supporting the view which is urged on behalf of the Crown, they go to show that were those particular provisions for entertainment absent, then you would have an ordinary tenancy agreement, and different considerations would apply. For example, Lord Finlay says (2): "The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the Governors in respect of these entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Sch. D." I find nothing in those observations to suggest that were a tenement to be let without furniture, which was not the case in *Coman* v. *Governors of Rotunda Hospital, Dublin* (1), the profits derived from the mere letting would be assessable under Sch. D. In the speech of Lord Shaw (3) the same conclusion is reached. I think that the observation which I quoted from Lord Loreburn's speech in *Smith* v. *Lion Brewery Co.* (4) and the whole treatment of *Coman* v. *Governors of Rotunda Hospital, Dublin* (1), in the House of Lords, where reliance was placed on the fact, that the letting for entertainments was a special and peculiar profit-making concern, all go to show that where there is, as here, a mere letting out by a company of property to tenants, the tax properly falls to be assessed under Sch. A. For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Holmes, Son & Pott; Solicitor of Inland Revenue.*

(1) [1921] 1 A. C. 1.
(2) Ibid. 18.
(3) [1921] 1 A. C. 37.
(4) [1911] A. C. 155.

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July 17, 18, 30.

DENNERLEY *v.* PRESTWICH URBAN DISTRICT COUNCIL.

[1928. D. 1320.]

Local Government—Urban District—Private Street Works—Apportionment of Expenses—Demand—"Owner for the time being"—New Owner—Specialty—Simple Contract Debt—Charge upon Land—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 12, 13, 14—*Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Civil Procedure Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 3—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

In 1910 an urban authority, having executed private street works in a certain street in its district, duly apportioned the expense on the premises fronting the street and demanded payment of the sums apportioned from the owners. One of the owners failed to pay the amount apportioned in respect of his land, and the amount upon completion of the works had become a charge upon that land by virtue of s. 13 of the Private Street Works Act, 1892. In 1927 the plaintiff became the owner of this land while the amount of the apportioned expenses in respect thereof was still unpaid. The urban authority made a demand upon the plaintiff for the amount:—

Held, (1.) that the urban authority was entitled to recover the amount of the expenses from the plaintiff as being "the owner for the time being" of the land within the meaning of s. 14 of the Act, and therefore to set off the amount against a sum claimed by the plaintiff from them, on the ground:—

By Scrutton L.J.: that a new cause of action at the suit of the urban authority against the plaintiff arose when the demand for payment was made upon him, and that the appropriate statute of limitations, whether it were the Limitation Act, 1623, or the Civil Procedure Act, 1833, began to run from the date of the demand and not from the completion of the works;

Per Greer L.J.: that a new cause of action arose when the plaintiff became the owner of the land, or when a demand for payment was made upon him, and that the appropriate period of limitation began to run from the one date or the other;

Per Slesser L.J.: that the new cause of action arose when the plaintiff became the owner of the land, and that the period of limitation began to run from that date.

Held, (2.) that s. 8 of the Real Property Limitation Act, 1874, did not defeat the claim of the urban authority, because:—

Per Scrutton and Greer L.JJ.: the period of limitation, twelve years, prescribed by that statute begins to run in favour of an "owner for the time being" within s. 14 of the Private Street Works Act from the time when a present right has accrued to receive the amount from him, and not from the time when a right accrued to receive the amount from a former owner;

Per Slesser L.J.: the amount claimed by the authority was not money "charged upon or payable out of land" within the meaning of s. 8 of the Real Property Limitation Act.

Hampstead Corporation v. *Caunt* [1903] 2 K. B. 1 followed.
Sutton v. *Sutton* (1882) 22 Ch. D. 511 distinguished.
Barnes v. *Glenton* [1899] 1 Q. B. 885 referred to.
Judgment of Shearman J. affirmed.

APPEAL from the judgment of Shearman J. on a special case stated for the opinion of the Court under Order XXXIV., r. 1, of the Rules of the Supreme Court.

The plaintiff brought an action against the defendants for 136*l.* 13*s.* 2*d.*, the balance of a grant of 225*l.* payable by the defendants to him under s. 2, sub-s. 3, of the Housing Act, 1923, in respect of three houses erected by him in the defendants' district in the year 1927. The defendants admitted that 225*l.* was due from them to the plaintiff in respect of the subsidy. They actually paid him 88*l.* 6*s.* 10*d.*, and claimed to retain the balance in respect of the private street works mentioned below. The parties agreed in stating the following case for the opinion of the Court:—

1. On August 9, 1910, the defendants, who had adopted the Private Street Works Act, 1892, duly made a final apportionment of the expenses of certain properly completed private street works, including road and sewerage works, in a street in their district known as Brookfield, upon the frontagers in that street, one of whom was Richard Fitton, the then owner of a vacant plot of land fronting, adjoining and abutting on Brookfield aforesaid.

2. The apportioned expenses—namely, 80*l.* 12*s.* 11*d.*—having been demanded from the said Richard Fitton, but not paid, the defendants became entitled to a charge upon the said vacant plot of land in respect thereof together with interest thereon at the rate of 4*l.* per centum per annum by virtue of s. 13, sub-s. 1, of the Private Street Works Act, 1892. (1) The interest now claimed for 17 years and 133 days is 56*l.* 0*s.* 3*d.*, which with the said sum of 80*l.* 12*s.* 11*d.* makes the above mentioned sum of 136*l.* 13*s.* 2*d.*

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(1) See note at the end of this report.

3. On February 17, 1927, the plaintiff purchased the said vacant plot of land.

4. The plaintiff says, and the defendants do not deny, that by the last mentioned date the defendants had lost the right to enforce the said charge by reason of the lapse of more than twelve years from the date on which the said works were completed.

5. In the year 1927 the plaintiff erected five houses on his said land, and the defendants paid him the subsidy of 75*l.* for each house provided for by the Housing Acts in respect of two of the said houses.

6. On November 17, 1927, the plaintiff wrote to the clerk to the defendants asking for payment of the subsidy in respect of the remaining three houses.

7. On November 18, 1927, the clerk to the defendants wrote to the plaintiff as follows (omitting formal parts): "The subsidy on these houses is being withheld until some settlement is reached in connection with the street charges which are owing on this land."

8. On November 24, 1927, the plaintiff's solicitors wrote to the clerk to the defendants threatening proceedings if the subsidy in respect of the three houses was not paid.

9. On December 22, 1927, the clerk to the defendants wrote to the plaintiff's solicitors as follows (omitting formal parts): "I am advised that the Council is entitled to deduct from the amount of the subsidy due to Mr. Dennerley the sum owing for the making up of Brookfield, coextensive with the land on which the subsidy houses have been erected. The sum so owing with interest to December 21, 1927, amounts to 136*l.* 13*s.* 2*d.*, and I now enclose a cheque for 88*l.* 6*s.* 10*d.*, being the difference between the sum of 225*l.* owing for the subsidy and the before mentioned sum of 136*l.* 13*s.* 2*d.*"

10. Among the conditions attached by the defendants to the grant of subsidy under s. 2, sub-s. 3 (*a*), of the Housing Act, 1923, and accepted by the plaintiff, was the following: "3. The net cost of the house to the purchaser shall not exceed 550*l.*, including land, house, road, sewer, and builder's profit, after deduction of the subsidy."

11. Save that nothing was paid by the plaintiff to the defendants in respect of "road" and "sewer" all other conditions which would entitle the plaintiff to the said 225*l.* were duly performed by him. The plaintiff says, and the defendants deny, that the said condition as to "road" and "sewer" was performed by him as the defendants' claim in respect thereof was barred by statute, and that in any case not more than the said sum of 80*l.* 12*s.* 11*d.* can lawfully be deducted. The net cost of each of the said five houses to each of the purchasers thereof was 550*l.*

12. The defendants say, and the plaintiff denies, that they are entitled, having made a demand upon him in that behalf since the purchase by him of the said plot of land, to recover by action or by deduction as aforesaid from him as the owner for the time being of the said plot of land the said sum of 136*l.* 13*s.* 2*d.* under and by virtue of s. 14 of the Private Street Works Act, 1892.

13. The defendants say, and the plaintiff denies, that the Limitation Act, 1623, if applicable in the premises runs only from the date of the said demand, and therefore does not operate to prevent the defendants from recovering the said sum of 136*l.* 13*s.* 2*d.* as aforesaid. . . .

14. Alternatively if, contrary to the defendants' contention in the last preceding paragraph hereof, the said sum is statute barred, the defendants say, and the plaintiff denies, that the said condition recited in para. 10 hereof is a sufficient acknowledgment by the plaintiff to take the same out of the statute.

15. The question for the opinion of the Court is whether in the foregoing circumstances the said deduction was lawful or unlawful. If the opinion of the Court shall be that it was unlawful, judgment shall be entered for the plaintiff with costs. If the opinion of the Court shall be that it was lawful, judgment shall be entered for the defendants with costs. If the opinion of the Court should be that it was unlawful to deduct more than the said sum of 80*l.* 12*s.* 11*d.*, judgment should be entered for the plaintiff for the said sum of 56*l.* 0*s.* 3*d.*, and the costs should be at the discretion of the Court.

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Shearman J. held that the effect of the legislation as interpreted by the authorities was to enable the defendants to make a demand upon any new owner of land for any unpaid amount of private street expenses apportioned by them and charged upon the land, together with interest on that amount at 4 per cent. per annum from the date of the final apportionment and to recover the amount and interest as a simple contract debt within six years from the date of the demand. He therefore gave judgment for the defendants.

The plaintiff appealed.

R. A. Glen for the appellant. On August 10, 1910, when the works were completed, the land in question became charged with a sum of 80*l.* 12*s.* 11*d.* by virtue of s. 13, sub-s. 1, of the Private Street Works Act, 1892 : *Hornsey Local Board* v. *Monarch Investment Building Society* (1) ; *Stock* v. *Meakin.* (2) On August 9, 1922, the land was freed from this charge by s. 8 of the Real Property Limitation Act, 1874, which provides that no action " shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent . . . but within twelve years next after a present right to receive the same shall have accrued." This is not denied by the respondents. That being so, the remedy by way of action for debt was barred also, even if the action was for a specialty debt : *Sutton* v. *Sutton* (3) ; *Shaw* v. *Crompton.* (4) If the effect of s. 14 of the Private Street Works Act, 1892, which says that the amount apportioned may be recovered " as a simple contract debt," is to make the debt a simple contract debt, then the action was barred in August, 1916, under the Limitation Act, 1623, notwithstanding that the amount of the debt was charged on land : *Barnes* v. *Glenton.* (5) When s. 14 of the Act of 1892 provides that the expenses may be recovered " from the owner for the time being " of the premises, it must mean that the expenses may be recoverable so long as the right to recover them has not been barred by statute.

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(1) (1889) 24 Q. B. D. 1.

(2) [1900] 1 Ch. 683.

(3) 22 Ch. D. 511.

(4) [1910] 2 K. B. 370.

(5) [1899] 1 Q. B. 885.

W. E. P. Done for the respondents. It is necessary to distinguish the charge upon the land and its incidents from the right of action to recover the amount of the expenses. The charge attaches when the works have been completed. The right of action does not accrue until demand is made upon the owner for the time being: *Hampstead Corporation* v. *Caunt.* (1) In case of non-payment the charge would be barred in twelve years, but the urban authority may elect to take payment by instalments over thirty years by s. 257 of the Public Health Act, 1875 (2), the provisions of which are incorporated in s. 14 of the Act of 1892. Any one who becomes the owner of the land in question may be the "owner for the time being." If expenses incurred for private street works are unpaid when he becomes owner, the urban authority may make a demand upon him for the unpaid expenses and thereupon he becomes liable to an action. This is a separate and distinct liability from that of any former owner: *Bermondsey Vestry* v. *Ramsey.* (3) There might be a change of ownership between the date when the works were completed and the date when the demand is made. The policy of the Legislature is to confer on urban authorities wide powers of recovering expenses incurred in improving their district, so that they may not be deterred from doing what they think expedient by the fear of not being able to recover the cost from the owners of the lands affected by the works. Statutes of limitation affecting the charge on the land or the liability of a former owner have nothing to do with the liability of the new owner, who by becoming an owner steps into a position in which a demand may be made and a liability imposed upon him. The period of limitation applicable to this liability is either six years under s. 3 of the Limitation Act, 1623, or twenty years under s. 3 of the Civil Procedure Act, 1833, from the date of the demand. In this case it is unnecessary to decide which statute applies, since the liability accrued in November, 1927. If it were necessary to decide this question, the right of action being created by statute and no period of limitation being prescribed, the liability is upon a specialty and the period of limitation is twenty years: *Cork and Bandon Ry. Co.* v. *Goode* (1); *Shepherd* v. *Hills.* (2) In either case *Sutton* v. *Sutton* (3) has no application.

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(1) [1903] 2 K. B. 1.

(2) See note at the end of this report.

(3) (1871) L. R. 6 C. P. 247.

With regard to s. 8 of the Real Property Limitation Act, 1874, first, the claim of the respondents is not for "money charged on or payable out of land" within the meaning of that section: *Barnes* v. *Glenton* (4); and secondly, even if the right to enforce the charge was barred the right to recover the amount against a new owner for the time being would be unaffected.

[He also cited *Douglas* v. *Forrest* (5); *West* v. *Downman* (6); and *Leeds Corporation* v. *Robshaw.* (7)]

R. A. Glen in reply.

Cur. adv. vult.

July 30. The following written judgments were delivered:—

SCRUTTON L.J. This appeal raises troublesome questions as to the application of whatever may be the appropriate Statute of Limitations to claims by Local Authorities under the Private Street Works Act, 1892, against the "owner for the time being" of property fronting a street in respect of which the Local Authorities have incurred expenses for which there is a charge on the property, and for which the owner for the time being is personally liable. The rights and procedure under the above Act differ materially from those under the Public Health Act, 1875, and the relevant London Acts.

The appropriate sections of the Act of 1892 are ss. 12 and 14. [The Lord Justice read s. 12, sub-s. 1, and s. 14 of the Act (8), and proceeded:] The charge on the property is imposed by s. 13, which I will refer to hereafter.

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(1) (1853) 13 C. B. 826.

(2) (1855) 11 Ex. 55.

(3) 22 Ch. D. 511.

(4) [1899] 1 Q. B. 885.

(5) (1828) 4 Bing. 686.

(6) (1880) 14 Ch. D. 111.

(7) (1887) 51 J. P. 441.

(8) See note at the end of this report.

The material facts in the present case are very simple. In 1910 the Local Authority executed certain private works on a street called Brookfield and apportioned the cost on the frontagers, one of whom was Richard Fitton. He did not pay his apportioned share. In 1927, the share of expenses on this land being still unpaid, Dennerley bought this land and erected houses on it under promise of a subsidy from the Local Authority. When the Local Authority came to pay the subsidy, they set off against it the amount alleged to be due to them from Dennerley as owner for the time being of the land in respect of the charges apportioned on the land. Dennerley, having issued a writ for the balance of the subsidy, a special case was stated to raise the question whether in view of the above dates the Local Authority were entitled to set off such apportioned expenses.

The first question was whether, assuming the Statute of Limitations of James I. was the applicable statute, the claim to set off was out of time. The plaintiff contended that the statute began to run in 1910 when the Local Authority could have sued Fitton. If so, the six years had, of course, expired before the set-off was claimed. The Local Authority contended that on the above assumption the statute did not begin to run against the authority till demand made on Dennerley, the owner for the time being. The Court made the suggestion that time could not begin to run against the authority till Dennerley became "the owner for the time being," up to which time he was under no personal liability to the Local Authority to pay the sum claimed. The statute makes the period within which actions must be brought six years "after the cause of such actions." Lindley L.J. defines this in *Reeves* v. *Butcher* (1) thus: "The cause of action arises at the time when the debt could first have been recovered by action": see also *Coburn* v. *Colledge* (2) and *Bradford Old Bank* v. *Sutcliffe.* (3) The Local Authority could not have sued Dennerley before he became "owner for the time being"; till then he had no relation with them

(1) [1891] 2 Q. B. 509, 511.
(2) [1897] 1 Q. B. 702.
(3) [1918] 2 K. B. 833, 848.

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contractual or statutory. The fact that they might have lost their right to sue Fitton personally does not prevent their suing a subsequent owner for the time being. I can find nothing in the statutes producing this result, and indeed it has been decided that the expiry of the six years against the first owner does not prevent the charge on his land from continuing: *Barnes* v. *Glenton.* (1) But I am also of opinion that time did not begin to run in favour of Dennerley until demand had been made on him, for until that had been done, he was under no personal liability. I agree with the reasoning of R. S. Wright J. in *Hampstead Corporation* v. *Caunt.* (2) In that case it was argued that if demand had been made on the first owner, no demand need be made on any subsequent owner. The learned judge treats it as ridiculous to suggest that a man can be liable for an amount of which he has never been informed by demand made on him for an ascertained sum, and concludes that the Statute of Limitations does not begin to run till demand made: see also *Grece* v. *Hunt.* (3)

So far therefore as the defence of the statute of James I. is concerned, in my opinion it fails the plaintiff. This relieves me from deciding the more difficult point whether the Statute of Limitations really applicable is not the Civil Procedure Act, 1833 (3 & 4 Wm. 4, c. 42), s. 3, which provides the period of twenty years as the limitation in actions on any specialty, "specialty" including actions solely statutory. I am inclined to think that but for the words in s. 14 of the Act of 1892 "to recover as a simple contract debt," it would be fairly clear that the action was based on a specialty. The relevant cases on the subject are cited in *Aylott* v. *West Ham Corporation.* (4) The statute of James I. uses the language "all actions of debt grounded on any . . . contract without specialty." It is however suggested that the words "to recover as a simple contract debt" turn the apparent specialty under s. 14 into a statutory debt with the six years' period of limitation. It is not necessary to decide whether this is so, but it appears to me that the footnote of Sir Frederick

(1) [1899] 1 Q. B. 885.
(2) [1903] 2 K. B. 1, 4.
(3) (1877) 2 Q. B. D. 389.
(4) [1927] 1 Ch. 30.

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Pollock, on page 3 of *Caunt's* case (1), is probably accurate as to the other statutes relating to street improvements.

So far the plaintiff fails, but a point was raised in this Court which does not appear in the special case, and which was not apparently argued in the Court below. It was argued that the Act of 1874 by s. 8 provided that no action to recover money charged upon land should be brought except within twelve years after a present right to receive the same had accrued; that such a right had accrued in 1910, and that the charge had therefore ceased in 1922, and with the cessation of the charge there had ceased any right to recover the sum charged as a personal liability. For this were cited the cases of *Sutton* v. *Sutton* (2) and *Shaw* v. *Crompton* (3), where it was held that in a mortgage or rent charge, when the charge lapsed by the expiration of twelve years, the effect of s. 8 was also to destroy the personal covenant to pay. The decision of *Sutton* v. *Sutton* (2) was treated by the Court of Appeal in *Barnes* v. *Glenton* (4) as deciding a very limited point. The only occasion on which s. 8 has been referred to in a case relating to private street works appears to be *Hornsey Local Board* v. *Monarch Investment Society*. (5) In that case there was no personal liability on the new owner and the present question did not therefore arise.

I am of opinion that s. 8 of the Act of 1874 does not apply to defeat a claim against Dennerley, the owner for the time being, for the Local Authority had no present right to receive the sum set off here from Dennerley till he became owner, and twelve years from that time have not elapsed. A further reason may be found in the provisions of s. 257 of the Public Health Act, 1875, made applicable by s. 13 of the Act of 1892, under which the amount apportioned may be made payable by annual instalments within a period not exceeding thirty years, recoverable from the owner or occupier for the time being. The twelve years' charge runs from completion of the works. The instalment order may be made at any time thereafter within the thirty years. I find it

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(1) [1903] 2 K. B. 1, 3.

(2) 22 Ch. D. 511.

(3) [1910] 2 K. B. 370.

(4) [1899] 1 Q. B. 885, 888, 889 890.

(5) 24 Q. B. D. 1.

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impossible to fit in this provision with the cessation of all personal liability at the cessation of the charge on the expiration of twelve years from the completion of the works. There is no hardship on the owner for the time being, as under s. 13, sub-s. 2, by consulting the register he can ascertain whether there has been any unsatisfied charge for the apportioned amount.

In my opinion, the appeal must be dismissed with costs.

GREER L.J. I have had the opportunity of reading the judgment of my Lord before putting my own into writing. I can therefore state my concurrence therewith quite shortly. I agree for the reasons stated by my Lord and on the authority of the decisions cited by him that the cause of action against the owner from time to time does not come into existence before the person against whom the action is brought becomes owner. The amount of the apportionment and interest only becomes recoverable from a new owner when he has become an owner, and it may be, though I think it is unnecessary to decide the point, only after demand made for payment by such new owner. Sect. 14 of the Private Street Works Act, 1892, gives the Authority a right to recover the apportioned expenses and interest from time to time from the owner for the time being, by summary proceedings or by action as a simple contract debt. The Statutes of Limitation impose a limitation on rights of action. Applying these statutes to the rights created by s. 14 of the Act of 1892, the limitation is a limitation on the right to recover by action against the person sued. This cannot be determined by ascertaining whether the right to recover against some other person who was owner at another time has been determined by lapse of time. If any authority is required for the proposition that the statutory obligations imposed on successive owners have the effect of creating separate causes of action against the owner liable from time to time, it will be found in the judgment of the Court of Common Pleas in the *Bermondsey Vestry* v. *Ramsey* (1), a decision on two sections of the Metropolis Management Amendment Act, 1862, which are, in all matters relevant to the point under consideration, similar to s. 14 of the Act of 1892. Therefore on the facts of this case, apart from the question arising under s. 8 of 37 & 38 Vict. c. 57, the Statute of Limitations, whether the relevant statute be 21 Jac. 1, c. 16, or 3 & 4 Wm. 4, c. 42, affords no answer to the defendants' claim of set-off.

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(1) L. R. 6 C. P. 247.

It remains for me to consider the effect of s. 8 of 37 & 38 Vict. c. 57. That section reads as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgement of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgement, or the last of such payments or acknowledgements, if more than one, was given." It will be seen that the twelve years' limitation imposed by the section is a period of time commencing not with the accrual of a cause of action, but with the accrual of a present right to receive a sum of money charged upon land. It was argued that, inasmuch as the defendants, when they demanded payment from the person who was the owner at the time of the apportionment, had a then present right to recover the money charged on the land, the twelve years began to run from the date of that demand. I think, however, the section should be read as referring to a present right to receive the same from the person against whom the action is brought, not a present right to receive the sum charged on land from a previous owner. Further, s. 14 of the Act of 1892 gives rise to separate simple contract debts arising on change of ownership from time to time, some of which may not arise until after the expiration of the twelve years that put an end to the charge. This case is not like *Sutton* v. *Sutton* (1), where it was held that s. 8 applied not merely to proceedings in equity to recover money charged on land by enforcement of the charge, but also to the common law action on the covenant. In *Barnes* v. *Glenton* (2) A. L. Smith and Romer L.JJ. based their judgments partly on the ground that s. 8 has no application to simple contract debts. It may be said that this was not strictly speaking necessary to the decision, but be this as it may, I am of opinion that s. 8 has no application to the simple contract obligations imposed on successive owners by s. 14 of the Act of 1892, in addition and without prejudice to other remedies.

I agree that this appeal should be dismissed with costs.

It was argued by Mr. Glen that the result of a decision in favour of the respondents would be that a Local Authority might by not making a claim against anybody for fifty or 100 years then come down on the then owner for the amount of the apportionment with the accumulated interest. If this should be the inevitable result of our judgment as to the meaning of the relevant statutes, the remedy is with the Legislature and not with us. My own view is that the Court would in an appropriate case follow the decisions of the Court of Chancery before the Real Property Limitation Act, 1874, and presume after twenty years that the debt had been paid and satisfied by some one or other of the successive owners: see *Barnes* v. *Glenton*. (2)

SLESSER L.J. This is an appeal from the judgment of Shearman J. delivered on a special case stated by consent for the opinion of the Court.

The issue in the case arises out of the claim of the defendants, the Prestwich Urban District Council, to deduct 136*l*. 13*s*. 2*d*. from a sum of 225*l*. admittedly due on a housing subsidy from them to the plaintiff. So far as the case is concerned therefore we may treat the 136*l*. 13*s*. 2*d*. as being the amount

(1) 22 Ch. D. 511.

(2) [1899] 1 Q. B. 885.

in dispute between the parties. The defendants in effect make claim to this sum, though by process of deduction as above stated, for the following reasons: In 1910, acting under the Private Street Works Act, 1892, more particularly s. 12, the District Council, who had completed a private street work, made their final apportionment of the expenses and demanded from one Richard Fitton a sum of 80*l.* 12*s.* 11*d.*, being his share of the expenses. On February 17, 1927, the plaintiff purchased the land in question from Fitton and proceeded to erect a house thereon, and the 136*l.* 13*s.* 2*d.* now claimed by the defendants by way of set-off is made up of the sum of 80*l.* 12*s.* 11*d.* with 56*l.* 0*s.* 3*d.* interest.

In substance, the objection of the plaintiff to pay this sum is based upon one or other of the statutes of limitation, more particularly the statute of James I. As has been stated, the land was bought by Mr. Fitton on August 9, 1910, and Mr. Dennerley's contention is in the first place that six years thereafter—namely, on August 9, 1916—the claim of the District Council for these expenses became barred by statute.

In order to decide this point it is necessary carefully to consider the construction and effect of the relevant sections of the Private Street Works Act, 1892, on which the defendant relies. By s. 14 of that Act it is provided as follows: [The Lord Justice read s. 14 of the Act (1) and proceeded:] I read this to mean, omitting irrelevant matter, that the defendants are expressly empowered to recover the sum due, together with interest as provided, from the owner for the time being of the premises and that, as each person in turn becomes the owner, the right to recover from him springs into existence. It was argued by Mr. Glen on behalf of the plaintiff that the most the section could do is to enable the Local Authority within six years of the origination of liability to recover from any person who happens to be the owner, for otherwise it might have been left in doubt, apart from the Statute of Limitations, whether a person who was not owner at the time when the original liability accrued could be sued at all. But such a construction does not seem to me to harmonize with the

(1) See note at the end of this report.

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language of the section. The section, it will be noted, provides that the sum due may be recovered as a simple contract debt by action from the owner for the time being, and the words "simple contract debt" and "owner for the time being" indicate to my mind that, as each person becomes the owner, a new notional contract is created by the statute, under which perhaps in consideration of the street works already done or the benefit therefrom which the new owner may be expected to enjoy, a liability in the nature of a contract to pay between him and the Local Authority comes into existence.

In the case of the Metropolis Management Act, 1855, as amended by the Metropolis Management Amendment Act, 1862, where provisions similar in many respects obtain, it is provided by s. 77 of the latter Act that the amount shall be recoverable from the present or any future owner of the premises. There is this difference, that by s. 105 of the Act of 1855, it was provided that the owner must pay the Vestry on demand, and, according to R. S. Wright J. in the case of *Hampstead Corporation* v. *Caunt* (1), no liability exists until the demand has been made. In that decision and on those statutes, it is true there is the assumption that a demand is the essence of the liability, but having said that, it does appear that once the necessary demand has been made, the Statute of Limitations, if it runs at all, does begin to run at the date of the demand whoever be the owner: see also *Wortley* v. *Vestry of St. Mary, Islington.* (2)

It has been argued by Mr. Glen in this case that, under s. 12 of the Private Street Works Act, 1892, although there is in fact no demand necessary to make the liability accrue (for it is there enacted that the sums approved shall be recoverable in manner provided by s. 14), as the original apportionment is equivalent to a demand, the Statute of Limitations should run from the date of apportionment or from the completion of the works; but, as against this view, s. 14 of the 1892 Act provides in terms that the Urban Authority may recover from the owner for the time

(1) [1903] 2 K. B. 1, 4.

(2) (1887) 51 J. P. 166.

being the sum due as a simple contract debt, and these words appear to me designedly to create a new liability in the new owner dating, not from the period of apportionment, but from the time when he became the owner.

If this view of a statutory notional contract with the new owner be correct, it follows that in this case he is not protected by the Limitation Act, 1623, the third section of which provides (inter alia) that all actions of contract without specialty shall be commenced and sued within six years next after the cause of such action or suit. The sum due, it is here provided, is to be recovered as a simple contract debt from the owner for the time being, and such an action of debt grounded upon contract, it is not disputed, was commenced and sued upon within six years of February 17, 1927. For these reasons, I am of opinion that the defence based upon the Statute of Limitations of James I. must fail.

It is scarcely necessary, in these circumstances, to deal with the contention that in any event, so far as this liability is founded upon statute—namely, the 1892 Act—it is not an action for simple debt without specialty. Were it necessary to decide this point, account would have to be taken of the fact that the period of limitation might not be six years but twenty, being in respect of an action founded upon a specialty (3 & 4 Wm. 4, c. 42, s. 3): *Cork and Bandon Ry. Co.* v. *Goode* (1); *Shepherd* v. *Hills.* (2) In *Hampstead Corporation* v. *Caunt* (3), decided under the Metropolis Management Acts, the learned editor of the Law Reports appears to think that in that case the action was so founded, but it is to be observed that in the 1892 statute, unlike the Metropolis Management Acts under which the *Hampstead* case (3) was decided, it is provided in terms that the sum shall be recovered as a simple contract debt and this appears to me to negative specialty. In the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7, sub-s. 7, it is provided as follows: "A claim for indemnity under this section shall be deemed a simple contract debt,

(1) 13 C. B. 826.

(2) 11 Ex. 55.

(3) [1903] 2 K. B. 1, 3.

and for the purposes of the Limitation Act, 1623, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim.". . . . The words in the 1892 Act in my judgment deal more definitely with the recovery of moneys than do the somewhat ambiguous words of the relevant sub-section of the 1897 Act, which seems to state that a claim shall be deemed to be a debt, but in that Act the Limitation Act of 1623 appears to be assumed to be applicable and this fortifies the view which I have formed that where the action is said in terms to be recoverable as a simple contract debt, it cannot be properly described as a specialty.

The second argument of Mr. Glen involves the application not of the Act of James I., but of the Real Property Limitation Act, 1874. It is said, alternatively, that this is an action to recover a sum of money charged upon land and so must be brought within the twelve years next after the present right to receive the money has accrued to some person capable of giving a discharge. If this be an action founded on a right to recover a sum of money charged upon land, the charge upon the premises which is created by s. 13 of the Act of 1892 becomes a charge on the premises in respect of which they are apportioned as from the date of the completion of the works: *Stock* v. *Meakin* (1); *Hornsey Local Board* v. *Monarch Investment Building Society*. (2) On this view, the twelve years from 1909 or 1910 would have run out several years before the cause of action in this case. I do not myself think that this point was ever argued before the learned judge—it is noticeable that, in the special case, the date of the completion of the works, which under *Stock* v. *Meakin* (1) is the first essential date, is not stated and, in the absence of any such finding or consideration by the learned judge, I am a little doubtful whether the point is here open to argument, but, in any event, I have come to the conclusion that the sum here due as a simple contract debt is not a sum of money charged on or payable

(1) [1900] 1 Ch. 683. (2) 24 Q. B. D. 1.

out of land. The personal remedy on a simple contract debt charged on land is still given by the Limitation Act of 1623 and the period of limitation is six years from the accrual of the cause of action: *Barnes* v. *Glenton* (1), distinguishing *Sutton* v. *Sutton*. (2) In my judgment, the use of the words "simple contract debt" in s. 14 goes far to solve the solution of the nice problems which have been raised in argument, and show clearly that the Statute of Limitations of James I. and no other can properly be applied in this case.

For the reasons above stated that statute in my view runs from the entry into ownership of Mr. Dennerley. I am of opinion consequently that the claim of the District Council to set off the sum due from him to them is well founded and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Gregory Rowcliffe & Co., for Grundy, Lamb & Grundy, Manchester.*

Solicitors for respondents: *Routh, Stacey & Castle, for Orford & Sons, Manchester.*

NOTE.

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. . . . .

"The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding five pounds per centum

(1) [1899] 1 Q. B. 885. (2) 22 Ch. D. 511.

per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises, in the same proportions as are allowed in the case of private improvement rates under this Act."

Private Street Works Act, 1892, s. 12, sub-s. 1: "When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be), and such final apportionment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875, including the power to declare any such expenses to be payable by instalments." . . . .

Sect. 13, sub-s. 1: "Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under s. 257 of the Public Health Act, 1875) with the sum finally apportioned on them . . . . with interest at the rate of four pounds per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver." . . . .

Sect. 14: "The urban authority, if they think fit, may from time to time (in addition and without prejudice to any other remedy) recover summarily in a court of summary jurisdiction, or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion of such sum, together with interest at a rate not exceeding four pounds per centum per annum, from the date of the final apportionment till payment thereof."

W. H. G.

CALLARD *v.* BEENEY.

1929
April 17, 18, 19 ; *May* 3.

Easement—Right of Way—Conveyance—Construction—Grant—Dominant Tenement—Appurtenant Rights.

In 1923 the plaintiff conveyed a freehold farm to the defendants' predecessor in title by a deed which contained the following words: "And together also with a right of way 14 feet wide as shown on the said plan marked A in and over the portion of the field numbered 171 belonging to the vendor for the purpose of access to and from the point marked X on the said plan to the field numbered 169."

The property consisted of seventy acres, forming part of a property of 102 acres originally conveyed to the plaintiff, of which the plaintiff retained the manor house and park :—

Held, that the dominant tenement in this grant was the whole of the lands assured by the deed, that the right of way was appurtenant to those lands, and was not limited to the right to use the way for purposes connected with field 169 only.

Appeal from Lewes County Court.

The following statement of facts is taken from the judgment of Wright J. :—

"This is an appeal from part of an order of the county court judge giving damages against the defendants for excessive user of a right of way and granting an injunction restraining them from using the right of way for any purposes other than access to and from the field No. 169 on the plan. The rest of the order in the action is not under appeal.

By a conveyance dated March 19, 1923, Mrs. Steel conveyed to the plaintiff Mrs. Callard a freehold property known as Browning's Manor in Sussex consisting of 102 acres, and including the house 'Browning Manor' and a farmhouse, stables and other premises, as shown on the plan attached to the conveyance. The property had been held in one ownership from 1865 to 1908, from 1908 to 1921 four fields had been separately held, but these were then repurchased and the unity of ownership restored. By a conveyance dated June 25, 1923, the plaintiff conveyed to one Eaton seventy acres of the property, including pieces of land, farm buildings and hereditaments. In effect the plaintiff retained only the Manor House, gardens and park, and conveyed the remainder, which is coloured blue on the plan annexed to the conveyance.

The portion conveyed consisted of several fields, separately numbered: the farm buildings, including a stock yard, were in the northern portion close to the Manor House, and consisted of fields 171 (part), 152, 153, 154, 155, 167, rather less than half the whole land conveyed, and the southern portion consisting of fields 169, 853, 863, 862, 860. The southern portion was separated from the northern portion on one side by the fields retained by the plaintiff, which formed a salient, and on another side by a wood and ravine. Field 169 was of 13.848 acres, and to the east of it were fields 853 (7.442 acres), 863 (4.747 acres), 862 (3.848 acres), 860 (6.880 acres). The farm was a dairy farm and the fields were used for grazing cows or for hay; the cows in the ordinary course had been taken, if milch cows, twice a day to the farm buildings from the southern fields. Owing to the nature of the ground this could not be done unless they were taken across the land retained by the plaintiff, otherwise than by a circuitous route, and along a considerable distance of further road. Certain rights of way were granted by the conveyance. [These are set out in the headnote.] By a conveyance dated March 25, 1926, Eaton conveyed the same property to Lord Strathcona, who, by a lease dated May 8, 1926, demised the same property to the defendants, who entered into possession and used one of the rights of way for the passage of their cows from the southern portion of the farm to the farm buildings. It is this user of which the plaintiff complains, alleging that the right of way is only granted for user in respect of cows grazing in field 169 and not for those grazing in the other fields of the southern portion. The county court judge has held that the complaint is justified and has granted the injunction above stated. The defendants now appeal."

Topham K.C. and *Percy Pitt* for the defendants.

Gavin Simonds K.C. and *Raymond Jennings* for the plaintiff.

The arguments sufficiently appear from the judgments of the Divisional Court (infra).

Cur. adv. vult.

May 3. The following written judgments were delivered :—

Talbot J. The question in this case is whether the defendants, who are respectively occupiers and owners of a farm of seventy acres in Sussex, conveyed in fee simple by the plaintiff to the predecessor in title of Lord Strathcona and demised by Lord Strathcona to the other defendants, are entitled to use a way over a close of the plaintiff as a means of passing between any part of the farm and a close of the defendants numbered 171 on the plan of the lands, or only between that close and another close of the defendants (part of the farm) numbered 169. The plaintiff claimed in the action, and obtained by the judgment under appeal damages for the use of the larger of these rights, and an injunction against that use. The lesser right is admitted.

The case depends on the construction of the following words in the conveyance dated June 25, 1923, from the plaintiff to one Eaton, from whom Lord Strathcona derives title, of the farm of seventy acres described in the schedule and delineated and coloured blue on the plan annexed to the deed : " And together also with a right of way 14 feet wide as shown on the said plan marked 'A' in and over the portion of the field numbered 171 belonging to the vendor for the purpose of access to and from the point marked X on the said plan to the field numbered 169 such right of way passing between the ponds as shown on the said plan."

The contention of the defendants, who are the appellants, is that the right of way granted by these words being appurtenant to the whole of the lands conveyed by the deed, is prima facie to be enjoyed for the benefit of the whole, and that there is nothing in the words by which it is granted to restrict this prima facie meaning.

The plaintiff contends that the words " for the purposes of access to . . . . the field numbered 169 " are apt and sufficient to define the scope of the right granted, and to limit it to a right to use the way for purposes connected with the use and occupation of the field numbered 169 only.

There is no doubt that a grant of land together with a right of way over the grantor's land simpliciter grants the right to use the way for all purposes connected with the land granted or any part of it, subject to any question, which does not arise here, of the effect of a change in the character or mode of occupation of the dominant land. Counsel for the plaintiff relies on two things in the words used here as showing that the right in question is limited to something less. The first is that one terminus of the way is not a point, but "the field numbered 169"; and the second that the words used are not merely "to and from the point marked X to the field" but "for the purpose of access to and from" etc. Four separate rights of way are granted by this deed, and it is pointed out that these words "purpose" and "access" occur only in the grant of this right of way, which is the third. It is curious that the words "for all purposes" occur in the other three grants and are omitted in this, though it is not, I think, suggested that this is of any significance or can make any difference in the legal effect of the words. We have, with the assistance of counsel, compared closely the language of the four grants. [The learned judge then described in detail the differences in the language.] It is said for the defendants that the manner in which these grants have been framed shows that it is impossible to treat these differences of wording as having much significance, and they rely on this as enforcing their contention that the prima facie effect of a grant of land with a right of way, as creating a right appurtenant to and for the benefit of the whole of the land assured, is not to be cut down except by clear and unambiguous words. The most striking difference between the language of the grant which we have to construe and that of the others is the words "for the purpose of access." It was said by counsel for the plaintiff that these are recognized by the usage of conveyancers as apt for effecting that which he says has been effected by them here—namely, the confining the right of way to purposes connected with the land to which the access is. I am bound to say that this assertion has not been made good. I have looked at some of the well known collections of precedents, and we were referred to others by counsel for the defendants, and I have found no trace of the use of those words for the purpose alleged. The ordinary form seems to be some such words as I find in Key & Elphinstone's Precedents of Conveyancing, 12th ed., vol. i., part i., p. 488, "for all purposes connected with the use and occupation of the said messuage and property . . . . but not further or otherwise"; and the words "but for no other purpose" seem to be common form, as they are certainly appropriate, in order to guard against any risk that a grant may have a wider operation than that which is affirmatively stated. I need not dwell on the difference between such words as I have read and those of this deed which we have to construe. When this part of the deed is examined it is seen that there is considerable difficulty in giving the words "for the purpose of access" the meaning for which the plaintiff contends. It is plain that they apply not only to field 169, but also to "the point marked X." As regards that they cannot operate to limit the purposes for which the way is to be used; they merely define its situation. It is not and could not be suggested that the grantee could only use the way to go to X. Why is not the same true of the other end? In one sense the parties are agreed. On either view of the words, the way is to afford "access" to field 169. Why does not that give access for the purpose of driving, e.g., to and through field 169, cattle going to field 863; just as access to X gives access to X for the purpose of driving cattle into the defendants' part of field 171 and so into the road? How can the same words have different meanings as to the two termini to which they equally apply? It is difficult to see how the actual meaning of "for the purpose of access to" differs from that of the single word "to." If a way is to a field or a house, it must be for the purpose of access to the field or house, and so conversely.

The defendants found their case primarily on what they say is the clear meaning of the deed; in the alternative they say if the deed is ambiguous it is proper, in order to see which of the possible meanings it bears, to consider surrounding circumstances; and they complain by their notice of appeal that the learned county court judge excluded such circumstances from his consideration, or failed to give them their proper weight; and they say if, which they deny, there is any ambiguity about the words of grant the circumstances show that the construction for which they contend is the right one. I do not think that there is much, if any, difference in principle between the parties, or between either of them and the county court judge, as to this. The parties differ as to what is the clear or primary meaning of the words by which the right of way is granted, and the county court judge adopts as to this the view of the plaintiff. But given the primary meaning of the words it does not seem to be denied that it is proper to look at the circumstances and conditions existing at the date of the deed to see whether there is anything in them which makes it impossible or unreasonable to apply the words according to their primary meaning. Nor do I find that the learned judge has refused or failed so to consider the circumstances and conditions. On the contrary he has done so, and finds in them nothing which affects the application of the material words according to what he holds to be their primary meaning. [His Lordship then discussed certain facts connected with the farm which the defendants contended supported their case on the construction of the deed.] I do not think that these matters would be enough to make it impossible or unreasonable to construe the grant according to the plaintiff's contention if that is the clear or primary meaning of the words. But if the words of the grant are ambiguous, it seems to me that the defendants are right in saying that the circumstances existing at the date of the grant support their view of their meaning. It should be borne in mind that in the absence of any clear indication of the intention of the parties the maxim that a grant must be construed most strictly against the grantor must be applied: per Willes J. in *Williams* v. *James*. (1) On the construction of this deed I am of opinion that the dominant tenement as respects this grant is the whole of the lands assured by the deed, and that the right is appurtenant to those lands and may be used for any purpose connected with them or any part of them. This is, of course, apart from any substantial change in the character or user of the land which may hereafter be made.

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(1) (1867) L. R. 2 C. P. 577, 581.

It remains to consider whether there is any authority which prevents us from so construing the deed. The statement will be found in text books of repute that a right of way to Blackacre does not include a right of way to a place beyond Blackacre. If this means, as I think it does, that a right appurtenant to Blackacre does not include a right to use the way really and substantially as a way through Blackacre to a place beyond, that is undoubtedly the law. The right to go to Blackacre and the right to go through Blackacre to Whiteacre are different rights. [His Lordship referred to the judgment of Parke B. in *Colchester* v. *Roberts* (1); *Skull* v. *Glenister* (2); and *Harris* v. *Flower & Sons* (3), and especially the judgment of Romer L.J. in the last case.] But we have been asked to give effect to the statement as meaning something quite different—namely, that the mere use of the words "to and from" a close in the grant of a right of way makes the right appurtenant to that close only, although the deed which contains the grant conveys that close with several others and grants the right of way "together with" the land conveyed so as to make it prima facie appurtenant to the whole. I know of no authority for this proposition, and in my opinion it is a misunderstanding of the statement of law which I have mentioned. The proposition in its true sense is only an example of the general rule that the burden on the servient tenement cannot be increased either by a substantial alteration in the character and mode of user of the dominant tenement or by an extension of its area. That the question in each case is what is the dominant tenement and not to what land the way is expressed to go is shown by *Thorpe* v. *Brumfitt* (4), where a right of way to a small piece of land conveyed by the same deed was held to be appurtenant to that land and other premises previously owned by the grantee. *Henning* v. *Burnet* (5), which was quoted for the plaintiff, decided that grant of a way "leading" to a house does not include a way past the house to a field conveyed with the house; a right so granted is appurtenant to the house and to nothing else. This depends on the difference in kind between a right of way to a house and to a field, and has no application to the present case.

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(1) (1839) 4 M. & W. 769, 773, 774.

(2) (1864) 16 C. B. (N. S.) 81; 33 L. J. (C. P.) 185.

(3) (1904) 91 L. T. 816, 819; 74 L. J. (Ch.) 127.

(4) (1873) L. R. 8 Ch. 650.

(5) (1852) 8 Ex. 187.

I fail to find in any of the authorities anything inconsistent with the opinion which I have formed upon the true construction of this deed. I am unable to agree with the county court judge on this point, and in my opinion the appeal must be allowed.

WRIGHT J. I agree that this appeal must be allowed. [After the statement of facts set out above his Lordship continued:] The question falls to be decided on the construction of the relevant clauses of the conveyance of June 25, 1923, since the defendants, through Lord Strathcona, hold under that conveyance, and it is a question of law. As Lord Wensleydale said in *Lord Waterpark* v. *Fennell* (1): "The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor." [His Lordship then read the material clauses in the deed granting rights of way, and after pointing out differences in the language used, continued:] The county court judge has held that these words are clear and unambiguous and limit the user of the right of way in question to cows grazing on field 169, with the result that the defendants are not entitled to use it for cows grazing in the other four fields round field 169, in other words he has treated field 169 and nothing else as the dominant tenement. In my judgment the county court judge is in error in limiting the material right of way as he has done. I hold each right of way is appurtenant to the whole of the tenement conveyed, and that there is only one dominant tenement for the whole land conveyed. There is in my judgment no ground for treating field 169 as a separate and limited dominant tenement in respect of the right of way over field 171. The conveyance is in terms of all those parcels containing in the whole seventy acres or thereabouts, together with the several rights of way. I think this is the true construction of the words used. Apart from words it is obvious that the defendants would be intolerably impeded in the ordinary daily operations of their farm if they could not bring their cattle from any portion of the southern fields across the short way to the farm buildings. I think that the right they claim flows from the express words, properly construed, and nothing need be implied. On the contrary the construction adopted by the county court judge seems to require an implied limitation. Counsel for the defendants has contested this and stated that to a conveyancer the words can only be construed as the county court judge has construed them. He has referred to no books of conveyancing precedents to support his contention. Counsel for the plaintiff has quoted precedents which point the other way.

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(1) (1859) 7 H. L. C. 650, 684.

The authorities referred to on either side do not afford much guidance. Mr. Topham has relied upon *Thorpe* v. *Brumfitt* (1), where a right of way conveyed along with a small piece of ground was held to be granted to enable access over that piece of ground to the yard of an inn. James L.J. said: "In the present case the right of way is expressed to be over a passage running between the highway and the piece of ground which is granted by the deed; it is therefore a grant of a right of way to and from that triangular piece of ground. This must be construed reasonably as meaning a right of way between the highway and the yard of the inn of which the grantees were the owners, the triangular piece of ground not being intended to be held as a separate property, but being granted only for the purpose of being thrown into the yard, so as to make a more convenient boundary line between the properties of the grantor and the grantees. I therefore am of opinion that this was a right of way which would pass as appurtenant to the inn." The facts in that case were special, but the principle applies

(1) L. R. 8 Ch. 650, 655.

to the present case, because in my judgment the right of way here in question was appurtenant to the whole seventy acres, "together with," which it was granted, and not to field 169 which was never intended to be held as a separate property.

Mr. Gavin Simonds for the defendants has relied on a principle that a right of way to and from Blackacre does not include a right of way to and from a place beyond Blackacre, which principle is said to be based on 1 Rolle's Abridgment, p. 391; and on *Lawton* v. *Ward*. (1) Even if this be the rule without qualification, it cannot apply in my judgment to this right of way, if I am right in holding that it is a right of way connecting parts of the same property conveyed as a single estate. The rule seems only to have been applied where the burden of the grantor was being increased beyond what the parties intended, for instance, where the right of way was being used, not for the purpose of the close to which it was appurtenant, but for other properties. Thus in *Skull* v. *Glenister* (2) a right of way was granted to Wheelers Close, and the defendants who had hired Wheelers Close used it as a place of deposit for building materials to be used on their own land adjoining. The jury found in effect that the right of way was being used merely for the purpose of carrying the building materials to their own land over Wheelers Close and it was held they were not entitled to do so. In that case a close had been added to the close as appurtenant to which the right of way was granted. The same principle was applied in *Harris* v. *Flower & Sons* (3), where the facts were in substance not dissimilar. Romer L.J. there states the law: "If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B." In the present case, as I have stated, I do not think that the right of way in question was granted for the enjoyment of field 169 in the sense postulated by Romer L.J., that is, as a separate tenement. In *Henning* v. *Burnet* (4) the express grant was only to the dwelling-house, coachhouse and stable, and was held not to justify the defendant in going to the field which lay on the other side of the way. That case throws no light on the present question.

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(1) (1696) 1 Raym. 75.

(2) 16 C. B. (N. S.) 81; 33 L. J. (C. P.) 185.

(3) 91 L. T. 816; 74 L. J. (Ch.) 127.

(4) 8 Ex. 187.

Appeal allowed.

Solicitors for plaintiff: *Grant, Davies & Co., for Blaker, Son & Young, Lewes.*

Solicitors for defendants: *Lawrence, Graham & Co., for J. K. Nye & Donne, Brighton.*

F. P. F.

RIDDLE *v.* PLAYLE AND ANOTHER.

1929
Oct. 21, 28.

Practice—County Court—Action remitted from High Court—Security for Costs—Jurisdiction of County Court Judge—" Court in which the plaint is entered "—County Courts Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *ss.* 2, 4 *sub-s.* 1—*County Court Rules,* 1903–1927, *Order* XII., *r.* 9—*Order* xxxiii., *r.* 3.

Where an action of tort is remitted from the High Court to the county court in default of finding security for costs, the county court judge has the same power to order the plaintiff to give security for costs as he would have if the action had been commenced in that county court.

APPEAL from Bow County Court.

The plaintiff, David Riddle, an infant, by his mother and next friend, Isabella Riddle, a widow, brought this action in the High Court against the defendants, William Gladstone Playle and his wife, claiming damages for personal injuries. On the application of the defendants the Master in Chambers on February 1, 1929, ordered the plaintiff to give security for the defendants' costs in the sum of 30*l.*, or, in default, that the action be remitted to Bow County Court. Default in depositing security being made the action was remitted accordingly. The defendants neither resided nor carried on business within twenty miles from Bow County Court, and accordingly applied under the provisions of Order XII., r. 9, of the County Court Rules, 1903–1927, for security for costs.

On June 10, 1929, the judge of Bow County Court made an order against the plaintiff for security for costs in the sum of 10*l*.

The plaintiff appealed.

Martin O'Connor for the plaintiff. The county court judge had no power to order security for costs. The jurisdiction to make the order is derived from Order XII., r. 9, of the County Court Rules, 1903–1927, which gives the power where the defendant neither resides nor carries on business within twenty miles of "the court in which the plaint is entered." No plaint in this case was entered in Bow County Court, and this rule does not apply to High Court actions remitted to the county court under s. 1 of the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73). In such case the county court judge has no other duty but to obey the order remitting the case to him and to try it: *Rex* v. *Mellor* (1), and cannot impose terms which in effect will prevent the trial. Where a case has been remitted the plaintiff is sent to a court not of his own choice, and it is unfair that he should be ordered to find security.

A. E. Woodgate for the defendants. The county court judge had jurisdiction to make the order. Once remitted to the county court the action became a county court action for all purposes. That appears clearly from s. 4, sub-s. 1, of the Act of 1919, and Order XXXIII., r. 3, of the County Court Rules. *Rex* v. *Mellor* (1) supports the defendants' case, for it was there held that the county court judge's duty was to try the case as if it had been commenced in his court. That is what was done in the present case, and the judge would therefore have power to make interlocutory orders. In *Plasycoed Collieries Co., Ld.* v. *Partridge, Jones & Co., Ld.* (2) the Court held that the fact that the case had been remitted did not prevent the county court judge from making an interlocutory order which admittedly he could have made had the action been commenced in his court. With regard to the suggestion of unfairness to this plaintiff in being ordered to find security where the case was remitted by the Master to a county court more than twenty miles from where the defendants live, the power to make the order is discretionary, and it must be assumed that the judge acted fairly on a consideration of all the circumstances. The words of s. 4, sub-s. 1, of the Act of 1919, and of Order XXXIII., r. 3, are quite clear, and in order to give effect to the plaintiff's suggestion the words would have to be added, "save that he shall not be able to apply for security for costs."

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(1) [1914] 2 K. B. 588.

(2) (1911) 104 L. T. 807.

[He was stopped.]

O'Connor in reply. If the case is to be treated as having been commenced in the county court it should be treated as having been commenced in the proper court—namely, the defendants' own court, i.e., within twenty miles of their place of business or residence, and when so commenced security for costs is never ordered.

BRANSON J. This is an appeal from an order made in the Bow County Court ordering the plaintiff within fourteen days to pay 10*l.* as security for the defendants' costs, and in default that the action be struck out. It is contended that the county court judge was wrong in law in making this order, and the ground of that contention is that Order XII., r. 9, of the County Court Rules, 1903–1927, under which the order was made, does not apply to remitted actions.

The action was commenced in the High Court, and on February 1, 1929, an order was made in that Court for security to be given by the plaintiff to the amount of 30*l.*, or in default that the action be remitted to Bow County Court for trial. That security was not given, and the action was accordingly transferred to that county court. Application for security was then made in that court under Order XII., r. 9, above mentioned, and the county court judge made the order appealed from.

The whole question turns on the interpretation of Order XII., r. 9 (1), of the County Court Rules, which provides: "Where a defendant neither resides nor carries on business within a distance of twenty miles from the court in which the plaint

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v.
PLAYLE.

Branson J.

is entered, he may make an application to the registrar in accordance with this rule for an order directing the plaintiff to deposit in court a sum of money as security for the costs of the defendant." The defendants did not reside or carry on business within twenty miles of Bow County Court. It is contended by the appellant that Order XII., r. 9, does not apply to any action except when commenced in a court selected by the plaintiff himself, which of course was not the case here. On the other hand it is argued that the rule is in general terms and applies to all actions coming before the court. To my mind the question is whether Bow County Court is "the court in which the plaint is entered" within the meaning of Order XII., r. 9 (1). That depends upon the sections in the County Courts Act, 1919, which deal with the transfer of actions from the High Court to the county court. The relevant sections are ss. 2 and 4. Sect. 2 gives the power to transfer, and s. 4 regulates the procedure on transfer. Sect. 4, sub-s. 1, after providing for the lodging of documents with the registrar of the county court, continues: "On the documents aforesaid being so lodged or sent, the action and counterclaim (if any), or the counterclaim or matter, shall be transferred to the said county court, and, subject to county court rules, all further proceedings therein shall be taken and tried as if the action, counterclaim, or matter had been originally commenced in that county court, and the county court shall have jurisdiction to deal with the same, any enactment to the contrary notwithstanding." If it be right when the action has been transferred to deal with it as if it had been commenced in the county court, then it is right to regard Bow County Court as "the court in which the plaint is entered." Order XXXIII., r. 1, of the County Court Rules, which regulates the procedure as to remitted actions, follows closely s. 4 of the Act of 1919, and sub-rule 3 dots the *i*'s and crosses the *t*'s by providing: "On the documents aforesaid being lodged and delivered the registrar shall enter the action . . . . for trial, and give notice to the parties of the day appointed for the trial." And Order XXXIII., r. 3, says: "Upon being served with a notice of trial under r. 1 of this Order, a defendant to the action or counterclaim shall proceed in all respects in the same way as if the action had been brought in the county court, and the notice so served upon him were an ordinary summons." Notice of trial had been duly served on the defendants.

In the face of these sections and rules it appears to me to be perfectly plain that where an action has been transferred to a county court it is for all purposes to be treated as an action which has been commenced in that court. In my view, therefore, the county court judge had ample jurisdiction to make the order for security for costs, and since it is a discretionary order we have nothing to do with the question whether he rightly exercised that discretion. It is well to emphasize the discretionary nature of the jurisdiction, for a large part of the argument for the appellant was directed to showing that its exercise might work hardship, or result in the plaintiff not being able to get his action tried. But the possibility that a discretion may be exercised wrongly does not entitle the Court to read into the rules words which are not there.

For these reasons I think that the appeal fails.

Hawke J. I agree, and I only wish to add one word which is really only a slight expansion of one point in my Lord's judgment. Order xxxiii., rr. 1 and 3, have been referred to. They provide machinery whereby the remitted action is treated as a county court action. The ordinary action in the county court is one begun under s. 73 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), by plaint. The rules provide that on a case being remitted it shall proceed as if the action had been commenced in the county court. In other words it must be treated as if it had been commenced by a plaint being entered.

Appeal dismissed.

Solicitors for appellant: *J. Nixon Watts & Co.*

Solicitors for respondents: *Douglas Wiseman & Co.*

W. L. L. B.

1929
Nov. 13.

LOWERY *v.* KINGSTON-UPON-HULL CORPORATION.

Rating—Rating of Owners instead of Occupiers—Weekly Properties—Demand for Part of Rate—Allowance to Owners paying "amount due" before a specified Date—Implication as to Date of Payment of Rates—Poor Relief Act, 1814 (54 *Geo.* 3, *c.* 170), *s.* 12—*Poor Rate Assessment and Collection Act,* 1869 (32 *&* 33 *Vict. c.* 41), *s.* 2—*Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 11, *sub-s.* 1.

By s. 11 of the Rating and Valuation Act, 1925, owners may under certain circumstances be rated to the general rate instead of occupiers, subject to an allowance if they pay in full before a specified date. In such cases the rate is to be recoverable from them as was the poor rate from occupiers. In the case of property let for a period not exceeding three months the occupier could not, by virtue of s. 2 of the Poor Rate Assessment and Collection Act, 1869, be compelled to pay at one time or within four weeks more than one quarter's rates. And by s. 12 of the Poor Relief Act, 1814, on non-payment within seven days of demand a warrant of distress might issue. A rating authority in the case of certain weekly properties resolved to rate owners instead of occupiers subject to an allowance for payment in full of the "amount due" by a date specified by the authority. On an owner's refusal to pay a demand for one quarter's rate (the portion of the half-year's rate due under the above s. 2 of the Act of 1869) by a date within seven days of demand, which date occurred a considerable time before the arrival of the date above specified for payment in full, the rating authority obtained a warrant of distress:—

Held, that s. 11 of the Act of 1925 had not by implication rendered the existing legislation inapplicable, and that, consequently, the owner was not entitled to refuse, until the arrival of the date specified by the rating authority, to pay the sum as demanded. She could still claim the deduction if she paid the half-year's rate in full before the specified date.

Case stated by the stipendiary magistrate of Kingston-upon-Hull.

On May 30, 1929, the respondents, the Kingston-upon-Hull Corporation, laid a complaint before the above magistrate charging that the appellant, Mary Elizabeth Lowery, being duly rated and assessed in respect of certain premises, of which she was owner, to the general rate made on April 11, 1929, in the sum of 1*l.* 10*s.* 11*d.* (being one quarter's rate in accordance with ss. 1 and 2 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), which deal with hereditaments let for not exceeding three months), refused to pay the said amount or any part thereof. The complaint was heard on June 13 and 24, 1929.

The following facts were proved or admitted. By resolution dated January 31, 1929, the respondents, acting under the provisions of s. 11, sub-s. 1, of the Rating and Valuation Act, 1925 (1), directed that in the case of all hereditaments the rent of which was collected at less than quarterly intervals and the rateable value of which did not exceed 10*l.*, the owners should be rated instead of the occupiers as from April 1, 1929. By a previous resolution dated December 6, 1928, the respondents had resolved that the compounding allowance under s. 11 of the Act of 1925 as amended (1) should be fixed at 15 per cent., and that the limit for compounding—namely, up to a rateable value of 10*l.*—should be retained. On December 27, 1928, the respondents passed a resolution under s. 11, sub-s. 1 (*a*) (1), that the dates by which rates in respect of compounded property should be paid in order to qualify for the compounding allowance should be July 31 and January 31 respectively. And by a resolution dated May 2, 1929, it was resolved that immediate payment of the compounded rate should be demanded in all cases where it appeared that a landlord in giving notice under the Rent

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(1) Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 11, sub-s. 1 (as amended by s. 137 and Sch. xii., Part V., of the Local Government Act, 1929 (19 Geo. 5, c. 17): "The rating authority may by resolution direct that, in the case of all hereditaments in their area (exclusive of hereditaments consisting of agricultural land) which belong to a class to be defined in the resolution by reference to rateable value and also, if rent is paid, by reference to the interval at which rent from time to time becomes payable or is collected, the owners thereof shall be rated instead of the occupiers. Provided that the class shall not be so defined as to include any hereditament . . . . the rateable value of which exceeds [certain limits].

Where a rating authority give any such direction as aforesaid: (*a*) the owners of any hereditaments in the area of that authority to which the direction applies shall, in the case of any rate made while the resolution is in force, be rated accordingly, and the rating authority shall make to any owner who being so rated pays the amount due by him in respect of the rate before the expiration of one-half of the period in respect of which the rate is made (or, if the rate is payable by instalments one-half of the period in respect of which the instalment is payable) or such later date or dates as may be specified in the resolution an allowance equal to ten per cent. of the amount payable."

This was increased to an amount not exceeding 15 per cent. by s. 3, sub-s. 1, of the Rating and Valuation Act, 1928 (18 & 19 Geo. 5, c. 8).

Restriction Acts or otherwise of an increase of rent on account of increase of rates had not allowed the full composition allowance, and that the town clerk, at the expiration of seven days of service of the demand, be instructed to take proceedings for the recovery of the rate.

The appellant was the owner of the premises in question, which were of a less rateable value than 10*l*., and were in the occupation of tenants who paid their rent weekly. The appellant had given her tenants notice of an increase of rent owing to increase in the rates, and had not allowed the full composition allowance.

On May 15, 1929, payment of the half-yearly instalment of the rate, 3*l*. 1*s*. 10*d*., "now due from you," was duly served on the appellant, though she was only required to pay one-half of this, 1*l*. 10*s*. 11*d*., in compliance with s. 2 of the said Act of 1869. On the face of the demand note was a statement that "if the amount be paid not later than July 31 a compounding allowance of 15 per cent. will be made." An accompanying letter from the city treasurer stated that the allowance of 15 per cent. would be made if the amount due was paid within the seven days, or if payment was obtained as the result of proceedings, but that if it was not so paid he was instructed to refer the matter to the town clerk in order that proceedings for its recovery might be taken.

The appellant refused to pay the said demand, and on the above proceedings the stipendiary magistrate held that she had failed to show sufficient ground for non-payment, and decided to issue a warrant of distress, but stated this case.

H. A. Hill for the appellant. No part of the rate was payable by the appellant until July 31, the date specified in the resolution of December 27, 1928, as that when rates in respect of compounded property should be paid in order to qualify for the compounding allowance under s. 11, sub-s. 1 (*a*), of the Rating and Valuation Act, 1925. That is the obvious inference from and the common sense view of that sub-section, and by implication the previous law as to payment and recovery, though not repealed, is rendered inapplicable to these cases by its provisions—see per North J. in *In re Williams* (1)—the rate being recoverable from the owner under the same conditions as from the occupier: s. 11, sub-s. 4, of the Act of 1925. The right to demand payment within seven days cannot co-exist with the obligation to make an allowance to those who pay later. The application for a distress warrant was made under s. 12 of the Poor Relief Act, 1814 (54 Geo. 3, c. 170), which deals with the non-payment of sums "legally demanded." This sum was not legally demanded, therefore the section does not apply. The imprisonment which might follow from a temporary inability to pay the present demand might result in inability to pay the full rate before July 31, and thus prevent the earning of the allowance.

The resolution of May 2, 1929, was ultra vires, being passed upon an irrelevant discrimination based on extraneous considerations.

Trustram Eve for the respondents. By s. 2, sub-s. 3, of the Rating and Valuation Act, 1925, this general rate is recoverable in the same way as the poor rate was recovered at the commencement of the Act, and by s. 11, sub-s. 4, rates payable by owners rated under sub-s. 1 instead of occupiers are recoverable from them in the same way as from occupiers. It is necessary therefore to see how poor rate was recoverable from occupiers. By the effect of ss. 1 and 2 of the Poor Rate Assessment and Collection Act, 1869, the occupier of a rateable hereditament let for a term not exceeding three months (which is the case here) cannot be compelled to pay at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year. That is all that is demanded here—namely, 1*l.* 10*s.* 11*d.*, being half the half-year's rate of 3*l.* 1*s.* 10*d.*—and had the respondents postponed their demand until July 31 and demanded the whole half-year's rate they could not have compelled payment. By s. 12 of the Poor Relief Act, 1814, the goods of one not paying the rate within seven days of demand can be distrained. The appellant can still get the full allowance

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(1) (1887) 36 Ch. D. 573, 578.

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if she pays the rate in full before July 31. The respondents could not deduct the allowance from this instalment, because until July 31 they could not know whether the appellant would pay in full and thus earn it. It is true that the demand note was for the whole half-year's rate, 3*l.* 1*s.* 10*d.*, one-half of which only is payable, but *Walton-on-the-Hill Overseers* v. *Jones* (1) shows that a demand note for the whole amount is good, though a part only thereof is payable.

Hill replied.

LORD HEWART C.J. This is a case stated by the learned stipendiary magistrate for the city and county of Kingston-upon-Hull. The question arises in the following way. On May 30 of this year the rating authority of Kingston-upon-Hull, the present respondents, complained that the present appellant, being a person duly rated and assessed in respect of a general rate made on April 11 last in the sum of 1*l.* 10*s.* 11*d.*, refused to pay the said amount or any part thereof: see the Poor Relief Act, 1601 (43 & 44 Eliz. c. 2), s. 1; the Poor Relief Act, 1814 (54 Geo. 3, c. 170), s. 12; and the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2. The learned magistrate, having heard the complaint, decided to issue his warrant of distress. The question for us is whether upon the facts he arrived at a correct determination in point of law. Two points and only two points have in substance been raised. In the first place it is said that at the material date no sum of money was due and payable at all by reason of the provisions of the Rating and Valuation Act, 1925. It is not necessary to read again s. 11; it is enough to say that under that section a rating authority may by a resolution direct that in certain cases owners shall be rated instead of occupiers. The section goes on to provide that in such cases the owners of the hereditaments shall be entitled to an allowance equal to 10 per cent., afterwards increased to 15 per cent., if payment of the rate is made within a certain period or before certain specified dates, and by the Rating and Valuation Act (Forms of Demand Note) Rules, 1926 (St. R. & O., No. 798), para. 3, it is provided that the form of the demand note shall be such

(1) [1893] 2 Q. B. 175.

as to contain information with respect to the allowance which may be claimed. The words of s. 11 are that the allowance is to be made to any owner who being so rated pays the amount due from him in respect of the rate before the expiration of one-half of the period in respect of which the rate is made, or, if the rate is payable by instalments, of one-half of the period in respect of which the instalment is payable, or such later date or dates as may be specified in the resolution. By s. 11, sub-s. 4, it is provided that: " Where in pursuance of this section the owner is rated or has undertaken to pay or collect the rates charged in respect of any hereditament, the amount due from him in respect of the rates shall be recoverable by the rating authority from him or, where the rates are collected by an agent of his, either from him or from that agent, in the same manner and subject to the same conditions in and subject to which rates are recoverable from occupiers of rated hereditaments."

Now it is of great importance here to observe that the rent of the premises referred to was payable weekly and the assessment for rating purposes was not over 10*l*. The fact that the rent was payable weekly brought the case within the Poor Rate Assessment and Collection Act, 1869, which provides, by ss. 1 and 2, taken together, that the occupier of a rateable hereditament let to him for a period not exceeding three months shall not be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year. In the present case the demand note did indeed refer to a sum of 3*l*. 1*s*. 10*d*., being the first instalment of a general rate made in respect of the year; in other words, the gross figure here is a figure representing the rate for half a year. The demand note went on to say, in conformity with the statute and the rule made under the statute, that if the amount were paid not later than July 31 a compounding allowance of 15 per cent. would be made. In form, therefore, there was a demand for the half-year's rate. But, as was held in the case of *Walton-on-the-Hill Overseers* v. *Jones* (1), it matters not that the written demand is for the whole of the half year; for under the statute of 1869 the amount which is presently payable is but the half of that—namely, a quarter's rate. And indeed when one looks at the form of the complaint in this case, the amount of money in respect of the general rate is not 3*l.* 1*s.* 10*d.* but is 1*l.* 10*s.* 11*d.*, the half of 3*l.* 1*s.* 10*d.*, and among the statutes referred to is the Poor Rate Assessment and Collection Act, 1869. In other words, what this appellant was being asked and required to pay was not a half-year's rate, but a quarter year's rate in conformity with s. 2 of the Act of 1869.

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(1) [1893] 2 Q. B. 175.

Yet it is urged upon us that she ought not to have been required to pay that or any sum, inasmuch as the effect of s. 11 of the Act of 1925 was to postpone to the specified date, payment before which would make the ratepayer entitled to an allowance, the right of the rating authority to demand or the obligation of the ratepayer to pay. It is said that, notwithstanding the clear terms of s. 12 of the Poor Relief Act, 1814, there was no right to demand payment of anything, nor was there in these circumstances a right to distrain for rates unpaid. A suggestion is made that, when the Act of 1814 is read side by side with the Act of 1925, the true conclusion is that the provisions of the earlier Act about collecting the rate have no application to hereditaments or ratepayers of this class, and that the demand for the rate ought to be postponed until the day specified as the day, payment before which entitles the ratepayer to the allowance. I do not dwell upon the chaotic results which as it seems to me would necessarily ensue if that argument were permitted to prevail. It seems to me entirely to ignore, and it is interesting to observe that the argument in fact gave the go-by to, s. 2 of the Act of 1869. What has happened here is not that this appellant has been required to pay six months' rate. She has been required to pay a half of that; and if she does pay it, or if it is collected involuntarily from her, it is still open to her to obtain the full allowance upon the half year's rate by punctually paying the remaining instalment. To put the matter the other way round, if the rating authority were to make the allowance upon this first quarter's rate—either the whole of the allowance or a proportionate part of it—non constat that the remaining instalment would be paid punctually. Non constat therefore that any allowance at all would have been justified by the facts. It seems to me, therefore, that these statutes may quite well live side by side, and that it was open to the rating authority to ask for the payment of this quarter's rate, and that that demand did not in the smallest degree prejudice the opportunity of the ratepayer to reap the whole benefit of the allowance mentioned in s. 11 of the Act of 1925 by punctual payment of the balance which would remain.

I think, therefore, that the first point fails. The second point, which was not so much urged as faintly indicated, was that here there had been an irrelevant discrimination, an exercise of partiality based upon extraneous considerations. It is said that the respondents had acted upon a resolution passed by them for the purpose of penalizing landlords who in their view had failed to give the tenants of small houses the full benefit of the composition allowance. It is to be observed that there is no finding of fact upon that matter in the case, nor does it appear that the resolution had anything whatever to do with the proceedings which were taken in the present case. It seems to me, therefore, that the learned magistrate was right in the decision to which he came, and that this appeal ought to be dismissed.

SWIFT J. I entirely agree with my Lord on both points, and I have nothing to add.

BRANSON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Steavenson & Couldwell, for Gosschalk & Austin, Kingston-upon-Hull.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for J. R. Howard Roberts, Town Clerk, Kingston-upon-Hull.*

W. L. L. B.

1929
July 10, 11,
31.

DICKINSON *v.* DEL SOLAR.

MOBILE AND GENERAL INSURANCE COMPANY, LIMITED (THIRD PARTIES).

[1928. D. No. 2316.]

International Law—Diplomatic Privilege—Secretary to Foreign Legation—Waiver of Privilege—Minister's Instructions—Legal Liability—Third Parties.

Diplomatic privilege does not impart immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent.

Taylor v. *Best* (1854) 14 C. B. 487 and *In re Suarez* [1918] 1 Ch. 176 followed.

FURTHER consideration of an action tried before the Lord Chief Justice and a special jury.

The following statement of the facts of the case and of the correspondence between the parties before the hearing is taken from the judgment of Lord Hewart C.J.:—

"This was an action in which the plaintiff, Mr. Robert Edmund Dickinson, sought to recover damages against the defendant, Emilio Del Solar, for injuries to the plaintiff caused by the negligent driving of a motor car by the defendant or his servant. That action was tried before me with a special jury on July 9 last, and in the result the jury awarded 856*l.* damages to the plaintiff. Judgment was entered accordingly with costs against the defendant, Emilio Del Solar. That defendant however had a policy of insurance with the third parties, the Mobile and General Insurance Company, Ld., and he claims against those third parties a declaration that he is entitled to be indemnified against any amount that he might be adjudged and ordered to pay to the plaintiff by way of damages in the action. The third party, the insurance company, in their defence, alleged that 'It was an express term of the said policy that the third party should, subject to the exceptions and conditions contained therein or endorsed thereon, indemnify the defendant (inter alia) against legal liability to members of the public in respect of accidental personal injury sustained or caused through the driving and/or management of the insured vehicle.' The third party alleged further that if the plaintiff in the action was injured, nevertheless the defendant was under no legal liability to the plaintiff by reason of the fact that the defendant was at all material times First Secretary of the Peruvian Legation and immune from civil process; alternatively, the third party relied upon certain alleged breaches of conditions.

It is not necessary to refer again to the policy of insurance, but it may be well to mention one or two of the letters which passed. The writ in the action was not issued until December 27, 1928; the accident, as it is called, had occurred on October 15, 1929. In the meantime, on November 9, the managing director had written to Mr. Emilio Del Solar saying: 'This matter is now in the hands of our assessor, to whom we are handing these papers, and you may rest assured that they will take the matter up immediately with the third party so that you will not be troubled further.' That third party was not, of course, the insurance company, it was the defendant in the action. On November 29, the managing director of the insurance company wrote to the defendant in the action: 'the above case has now become rather more serious than we at first anticipated, and we shall be grateful if you will grant our representative another interview.' And on November 30 the defendant replied: 'I beg to inform you that I regret to be unable to see your representative, because I pay a premium to be insured, in order not to be troubled, and besides I have told him I cannot plead any diplomatic immunity.'

There followed correspondence; the representative of the insurance company was seen again by the defendant and it was made quite clear that the Minister of the Peruvian Legation had intervened and had forbidden the defendant to rely upon diplomatic immunity, inasmuch as the collision had taken place when the car was being used not for official but for private purposes. In the meantime certain steps had been taken in the action; an appearance had been entered by the insurance company for the defendant, other steps had been taken, and finally, when it was made abundantly clear that diplomatic privilege was not to be pleaded, this letter of March 5, 1929, was written by Mr. Del Solar's solicitors to the solicitors to the insurance company: 'We have seen His Excellency the Peruvian Minister personally on this matter, and he has definitely repeated the instructions he has already given to his first secretary, Mr. Del Solar, to the effect that diplomatic privilege is not to be pleaded in this action; in our submission, therefore, the effect is that, so far at any rate as this claim is concerned, Mr. Del Solar has not and never did have any diplomatic privilege at all, so that it is impossible for him to claim it even if he wished to do so.'

After a further explanation that in the opinion of the Peruvian Minister diplomatic immunity should only cover official acts, the solicitors to the insurance company wrote on March 18, 1929, to the solicitors for Mr. Del Solar: 'We now have definite instructions from the Mobile and General Insurance Co., Ld., that they insist on having absolute control of all negotiations and proceedings in this claim under the conditions of their policy. Since your client will not allow them to have this absolute control he has broken the conditions under which the policy was issued to him. We therefore hand you over at your request as his solicitor the papers in this action—namely, the writ, appearance, summonses and statement of claim. It will be necessary to apply at the Court to-morrow for a summons for further time to deliver the defence. Will you let us know by telephone to-day whether we shall apply for this summons or whether you will? We have written to the plaintiff's solicitors to-day for further time to deliver the defence, and explaining to them that we have handed over the papers to you at your request.'"

Bensley Wells (*S. J. R. Bucknill* with him) for Mr. Del Solar. Diplomatic immunity is a privilege which is possessed by a foreign sovereign but which he may waive. Diplomatic agents enjoy no higher immunity than their sovereign. Here the agent has submitted to the jurisdiction by entering appearance, and he has so acted on the instructions of his superior, the Peruvian Minister. The company cannot therefore now ask the defendant to adopt a different attitude: *Taylor* v. *Best.* (1) That case was followed in *In re Suarez* (2), where the Court of Appeal held that an Ambassador can with consent of his Government waive his privilege, and that his immunity will then cease.

[They cited also *In re Republic of Bolivia Exploration Syndicate* (3) and *Duff Development Co.* v. *Government of Kelantan.* (4)]

Tristram Beresford for the company. Waiver of diplomatic privilege by the defendant Del Solar is not sufficient to render the company liable on the policy. Under the terms of the policy the defendant must not act "in any way to the detriment or prejudice of the company's interests," and "the company is entitled to take absolute control of all negotiations and proceedings." He must afford the company every assistance in his power. This refusal to do so is a breach of the conditions of the policy. The defendant by virtue of his privilege is not liable for any act for which a British subject residing here would be liable. There has been no effective waiver. Any rights held by the defendant passed to the company under the policy, and they alone can consent to waive the plea of diplomatic privilege.

As to enforcing a judgment against the defendant execution cannot issue against him by virtue of his privilege. The case differs from *The Newbattle* (5), where the foreign sovereign was the plaintiff and had invoked the jurisdiction of the Court.

[He referred also to *Engelke* v. *Musmann.* (6)]

Cur. adv. vult.

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(1) 14 C. B. 487.
(2) [1918] 1 Ch. 176.
(3) [1914] 1 Ch. 139.
(4) [1924] A. C. 797.
(5) (1885) 10 P. D. 33.
(6) [1928] A. C. 433.

July 31. LORD HEWART C.J. [after making the above statement of facts, continued:] Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent: *Taylor* v. *Best* (1); *In re Suarez.* (2) In the present case the privilege was waived and jurisdiction was submitted to by the entry of appearance: *In re Suarez* (2); *Duff Development Co.* v. *Government of Kelantan* (3), and as Mr. Del Solar had so submitted to the jurisdiction it was no longer open to him to set up privilege. If privilege had been pleaded as a defence, the defence could, in the circumstances, have been struck out. Mr. Del Solar was bound to obey the direction of his Minister in the matter. In these circumstances it does not appear to me that there has been, on the part of Mr. Del Solar, any breach of the conditions of the policy, and the judgment clearly creates a legal liability against which the insurance company have agreed to indemnify him. It has been argued that by reason of the privilege execution cannot issue against Mr. Del Solar on the judgment. That is perhaps an open question: *Duff Development Co.* v. *Government of Kelantan.* (3) But in my opinion it is not necessary to decide it. Even if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceased to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time. I hold therefore that the third parties here are liable.

Solicitors for defendant: *Digby & Co.*

Solicitors for third parties: *S. Myers & Son.*

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(1) 14 C. B. 487.

(2) [1918] 1 Ch. 176, 193.

(3) [1924] A. C. 797, 830.

F. P. F.

Followed. Regor Estates Ld. v. Wright
[1951] 1 K. B. 689

HILL *v.* BOOTH.

[1929. H. 667.]

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Oct. 28, 29.

Landlord and Tenant—Lease—Premium "reserved" and payable by Instalments—Right of Re-entry if Instalment of Premium in Arrear—Purchase of Freehold by Lessee—Merger—Liability for unpaid Balance of Premium—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 63, 76, 141.

Certain premises were let for twenty-one years in consideration of (1.) a premium of 1000*l.* of which 200*l.* was paid on the execution of the lease, and (2.) a yearly rent. The lease provided that the lessee would pay "that portion viz. 800*l.* of the premium of 1000*l.* hereby reserved which is not paid on the execution hereof" by certain instalments, "provided that in the event of the term hereby granted being determined by re-entry .... all the premium unpaid at the date of such re-entry shall become immediately due and payable." A right of re-entry was given if the rent reserved or any instalment of the premium should be in arrear for a certain time. During the currency of the lease, and before the balance of the premium had been paid, the premises, which had been mortgaged by the lessor, were sold to the lessee by the mortgagees in exercise of their powers of sale. Thereupon the lessor sued the lessee to recover the unpaid balance of the premium. The lessee contended that on the determination of the lease all his obligations thereunder, including the obligation as to the premium, were extinguished:—

Held, that the premium was not a "demand .... in, to, or on the property" within s. 63, sub-s. 1, of the Law of Property Act, 1925, or a "covenant or provision .... having reference to the subject-matter" of the lease, within s. 141, sub-s. 1, of that Act, but was a sum which the lessee had agreed to pay in order to obtain the lease, and, therefore, that his obligation to pay the full amount of the premium was not extinguished by the determination of the lease.

APPEAL from a decision of Acton J.

The plaintiff claimed to recover the balance of a premium under a covenant contained in a lease dated July 21, 1926, by which the plaintiff let to the defendant certain premises known as the Coliseum Theatre and Assembly Rooms at Gorleston-on-Sea.

The plaintiff, on February 14, 1925, purchased the premises above referred to, and on February 17, 1925, he charged them in favour of Barclays Bank, Ld., and appointed an official of the bank to be his attorney to sign, seal and deliver any deed which might be necessary for the sale of the property

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under the power of sale thereby created in order to vest in the purchaser the legal estate and all other his estate and interest in the property.

On July 21, 1926, the plaintiff granted a lease of the said premises to the defendant. The lease witnessed that "in consideration of the sum of 1000*l.* of which the sum of 200*l.* is paid on the execution hereof . . . . and the remainder thereof is to be paid in manner hereinafter provided and of the rent hereinafter reserved and of the covenants on the part of the lessee and conditions hereinafter contained the lessor doth hereby demise unto the lessee all that piece or parcel of land situate in . . . . Gorleston-on-Sea . . . . together with the buildings erected thereon and known as the Coliseum Theatre and the Assembly Rooms Gorleston-on-Sea aforesaid . . . . and together with all fixtures fittings and furniture specified in the schedule hereto To hold unto the lessee for the term of twenty-one years from June 24, 1926, determinable nevertheless as hereinafter provided yielding and paying therefor during the said term the yearly rent of 1100*l.* to be paid by equal quarterly payments in advance . . . . and also yielding and paying in the event of and immediately upon the said term being determined by re-entry under the proviso hereinafter contained a proportionate part of the said rent for the fraction of the current quarter up to the day of such re-entry and the lessee doth hereby for himself his executors administrators and assigns covenant with the lessor in manner following that is to say:—

"1. That the lessee will pay that portion viz. 800*l.* of the premium of 1000*l.* hereby reserved which is not paid on the execution hereof as to 300*l.* part thereof by ten equal monthly instalments of 30*l.* each whereof the first instalment is to be paid on April 1, 1927, and as to the remaining 500*l.* thereof by two instalments of 250*l.* each the one to be paid on June 24, 1927, and the other on June 24, 1928, provided that in the event of the term hereby granted being determined by re-entry under the proviso hereinafter contained all the premium unpaid at the date of such re-entry shall become immediately due and payable."

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" 15. And also will at the expiration or sooner determination of the said term deliver up to the lessor the said premises hereby demised with all additions thereto and all fixtures fittings and furniture hereby demised and all fixtures which may at any time during the seven years immediately prior to the expiration or sooner determination of the said term be in or about the said premises tenants' and trade fixtures excepted. . . . ."

" 18. Provided that if at any time during the first seven years of the term hereby granted the lessee including particularly his executors administrators and permitted assigns shall be desirous of purchasing the freehold of the whole of the said premises . . . . and the said fixtures fittings and furniture at the price hereinafter mentioned and shall at any time prior to June 24, 1933, give to the lessor one quarter's notice in writing to that effect then and in such case the person giving such notice shall be the purchaser of the freehold of the said premises . . . . and the fixtures fittings and furniture at the price of 13,000*l.* less the whole or such part of the said premium of 1000*l.* as shall at the date of completion of the said purchase have been paid as from the expiration of such notice. . . . ."

" 19. Provided always and these presents are upon this express condition that if the said rent hereby reserved or any instalment of the premium hereby agreed to be paid or any part thereof shall at any time be in arrear or unpaid for twenty-one days after the same shall have become due . . . . it shall be lawful for the lessor or any person or persons duly authorised by him in that behalf into or upon the said hereby demised premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach or non-performance of any of the covenants by the lessee hereinbefore contained."

" 20. And the lessor doth hereby for himself his heirs executors administrators and assigns covenant with the lessee that he the lessee paying the said premium and rent hereby made payable and reserved and performing and observing the covenants by the lessee and conditions herein contained may peaceably hold and enjoy the said premises during the said term. . . . ."

By a conveyance dated October 12, 1926, to which the plaintiff was a party, Barclays Bank, Ld., as mortgagees and in exercise of their powers of sale, sold to the defendant the fee simple of the said premises for 8350*l.*

By a writ issued on March 9, 1927, the plaintiff claimed from the defendant the return of certain fittings, goods and chattels which the defendant had covenanted by clause 15 of the lease hereinbefore recited to deliver up to the plaintiff on the expiration or sooner determination of the term. The defendant claimed that he purchased the premises together with all landlord's fixtures and fittings in or upon the building for 8350*l.* and that they had passed to him. In that action Roche J. gave judgment for the plaintiff for such of the fittings and furniture as were not attached to the freehold.

By the writ in the present action dated February 25, 1929, the plaintiff claimed 800*l.* as the unpaid balance of the premium under the lease. By his defence the defendant said that upon the execution of the conveyance to him dated October 12, 1926, of the fee simple of the premises the lease and all obligations thereunder were finally determined. He further said that the plaintiff by his action for the recovery of the fittings and furniture was estopped from alleging that the lease had not been determined.

Acton J. held that the 1000*l.* described in the lease as "the premium" was a sum of money which the defendant as lessee agreed to pay as the consideration for the granting of the lease, and that as soon as the lease was granted there was a liability on him to pay the amount. When the lease spoke of a "premium" it meant something entirely distinct from, and not on the same footing as, the rent; it was a sum which the defendant as lessee was prepared to give as a foregift for the privilege of obtaining the lease. Acton J. accordingly gave judgment for the plaintiff for 800*l.*

The defendant appealed.

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Vaisey K.C. and *Cope Morgan* for the appellant. By virtue of the terms of the lease, and in particular by virtue of the right of re-entry given to the lessor in the event of any instalment of the premium being in arrear, the covenant to pay the premium was destroyed on the lease being determined by merger. This is also clear by s. 63, sub-s. 1, of the Law of Property Act, 1925, which provides that "every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same." The claim to the premium is, within that section, a demand on the property, as it is secured by the right of re-entry.

[GREER L.J. The right of re-entry may have gone but the right to the premium may remain.]

The latter right is negatived by s. 141, sub-s. 1, of the Law of Property Act, 1925, which says that "rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land." The premium was in terms "reserved" by the lease, and by the very words of the section the obligation to pay it became extinguished on the merger of the lease.

[They also referred to s. 76 of the Act of 1925.]

The respondent is estopped by the action decided by Roche J. as to the furniture from saying that the lease has not been determined; and if it has been determined all the covenants have become extinguished.

Cave K.C. and *Graham Mould* for the respondent were not called upon.

SCRUTTON L.J. In this case, which raises a somewhat curious point, I have no doubt about the merits, but certain technicalities have given rise to some difficulty.

The respondent, the plaintiff in the action, owned certain premises—a theatre—at Gorleston-on-Sea. Being indebted to Barclays Bank in a sum of about 8000*l.*, he, in February, 1925, mortgaged those premises to the bank and appointed one of its officials as his attorney in case the power of sale thereby given should be exercised. On July 21, 1926, the respondent let the premises to the appellant for a term of twenty-one years. By the lease it was witnessed that "in consideration of the sum of 1000*l.* of which the sum of 200*l.* is paid on the execution hereof . . . . and the remainder thereof is to be paid in manner hereinafter provided and of the rent hereinafter reserved, and of the covenants on the part of the lessee and conditions hereinafter contained the lessor doth hereby demise unto the lessee" the premises in question together with all fixtures, fittings and furniture specified in the schedule to the lease. Some of the furniture were mere chattels not attached to the premises. The lease gave the lessee an option, exercisable within the first seven years, to purchase the freehold for 13,000*l.*, and if that option was exercised the amount payable was to be "less the whole or such part of the said premium of 1000*l.* as shall at the date of completion of the said purchase have been paid."

Clause 1 of the lease describes the sum of 1000*l.* as a "premium"; it then specifies the dates when the instalments of the balance of 800*l.* are to be paid, and it continues, "provided that in the event of the term hereby granted being determined by re-entry under the proviso hereinafter contained all the premium unpaid at the date of such re-entry shall become immediately due and payable." Clause 19 gives a right of re-entry if the rent thereby reserved or any instalment of the premium thereby agreed to be paid should be in arrear or unpaid for twenty-one days.

What happened and thus gave rise to the present question was that Barclays Bank exercised their powers as mortgagees and as attorneys of the respondent, the mortgagor, and sold the land, buildings, fixtures and fittings to the lessee, the appellant. Thereupon the respondent called upon the appellant to pay the balance of the premium, to which the appellant replied that having purchased the reversion, the lease had merged in the freehold and the covenant to pay the premium was gone.

Ordinarily a premium is paid to obtain a lease, and it does not matter what happens to the lease afterwards. The premium is payable for the grant of the lease. Mr. Vaisey admitted that if the transaction were : "I will pay a premium of 1000*l.* for the granting of the lease" it would not matter if the lease afterwards became merged in the freehold ; but he says that the circumstance that the clauses about the payment of the premium being inserted in the lease and a power of re-entry given for its non-payment makes all the difference, and that the effect of the lessee taking the reversion is a merger which destroys the covenant to pay the premium. Acton J. rejected this contention, hence the present appeal.

In arriving at my judgment I am considerably influenced by the fact that the sum payable is described as a "premium," a term which according to its ordinary business meaning is, as I have said, a sum paid for the granting of a lease and which is to be paid irrespective of the fact that afterwards the lessee purchases the reversion. Why the lease was drafted in this odd way and why the premium is described in the lease as "reserved" I do not understand. It is not a reservation in any way. A reservation technically is the grant out of the subject-matter conveyed of something not previously existing, as a rent or an easement. This in my view is not a grant out of the land and buildings which are leased ; it reserves no interest in the land or buildings ; it is a separate personal covenant to pay the premium because the lease has been granted. I asked Mr. Vaisey, who argued the case with his usual clearness, what would happen if the consideration for demising the premises had included a personal covenant by the lessee to buy his butcher's meat for ten years from a lessor who was a butcher. He said it was a difficult question. To me it does not seem difficult. Like a premium it would be a personal promise in consideration of the lease being granted ; if the lease was granted, the fact that it afterwards merged in the reversion would make no difference in the nature of the promise; it would still be a personal promise.

The mortgage to Barclays Bank was only of the land and buildings, but the lease included a number of chattels which were not fixtures. By the lease the furniture was to be handed back on the determination of the lease. When the lease was merged in the freehold the lessor claimed a return of the furniture, and Roche J., before whom that claim came, decided that it succeeded, and that the determination of the lease by merger did not destroy the covenant in the lease to return the furniture to the lessor on the determination of the lease. So too in this matter the merger of the lease did not destroy the covenant to pay the sum of money called a "premium," a "premium" having the ordinary meaning of a sum paid for the granting of the lease.

For these reasons I think the view taken by Acton J. was right. He did not refer in his judgment to s. 141 of the Law of Property Act, 1925, which Mr. Vaisey pressed strongly upon us as supporting his contention. As I understood his argument it was that the reversion in the land passing by the mortgage to Barclays Bank and passing by the conveyance from the bank to the purchaser passes with it the benefit of every covenant or provision having reference to the subject-matter of the lease; consequently it passes the obligation to pay the premium, and consequently I suppose it would pass the obligation to return the furniture, as has been decided by Roche J. Sect. 141 does not apply to this case, inasmuch as in my view it only passes covenants having reference to the subject-matter of the lease, and the subject-matter of the lease is land and buildings and possibly the furniture, and not the initial grant of the lease, which is what the 1000*l.* was to be paid for. I therefore find no difficulty from s. 141. For these reasons I am of opinion that the appeal must be dismissed.

GREER L.J. I agree. In July, 1926, the respondent, who was the owner of a theatre in Gorleston, executed a lease of the building and land on which it stood to the appellant in consideration of the payment, first, of a sum of 1000*l.*, which is stated in the lease to be a "premium," and secondly in consideration of a rent and certain covenants. The property had been mortgaged by the lessor—the respondent—and shortly after the lease was granted the mortgagees sold the property, as they were entitled to do, to the appellant, who says that, having acquired the freehold, he thereby became freed from all the obligations of the lease relating to the enjoyment of the property—free from the rent, free from the covenants as to how the property should be dealt with as between himself and the lessor, and free from the obligation to pay the unpaid balance of the premium. Acton J. has held that the appellant is not free from the last mentioned obligation, and I agree with him.

The question is not free from difficulty. The lease "witnesseth that in consideration of the sum of 1000*l.* . . . . and of the rent hereinafter reserved and of the covenants on the part of the lessee and conditions hereinafter contained the lessor doth hereby demise to the lessee" the parcels mentioned in the lease. A clear distinction is drawn by the very words of the lease between the 1000*l.* and the rent which periodically issues out of the premises. When we come to that part of the lease which says what the rent is we find that it says "yielding and paying therefor during the said term the yearly rent of 1100*l.* to be paid by equal quarterly payments in advance," but it does not say that the land is to yield the instalments of the premium. In my judgment Acton J. was right in holding that the effect of the lease is to make the premium of 1000*l.* a sum which is payable once and for all for the granting of the lease. The consideration for the premium was given by the lessor once and for all on the execution of the lease, and, consequently, he is entitled to the whole 1000*l.*, and not merely the first instalment of it. The fact that the premium is made payable by instalments makes no difference to the proper description of the 1000*l.* as a "premium" payable for the granting of the lease. That view is confirmed by clause 1, which unfortunately uses the word "reserved," a term not strictly applicable to the payment of a premium, because it provides that "in the event of the term hereby granted being determined by re-entry under the proviso hereinafter contained all the premium unpaid at the date of such re-entry shall become immediately due and payable."

The only doubt in my mind has arisen upon the proviso for re-entry, which provides for re-entry not merely on non-payment of the rent but on non-payment of any instalment of the premium. That seems to make the right of re-entry in respect of the premium an incumbrance on the land. The right of forfeiture and the right of re-entry are rightly described as incumbrances on the land, and I think under the Act of 1925 that right of re-entry has gone. The non-payment of the premium would not justify the lessor in entering upon the land the freehold of which had become vested in the lessee. But that does not affect the separate obligation to pay the 1000*l.* premium.

It is necessary to say a word as to the sections of the Law of Property Act, 1925, which have been relied upon on behalf of the appellant. As to s. 141 I agree with my Lord that as it does not cover the terms of the lease as regards the furniture, so also it does not cover terms relating to the payment of the premium merely because they were inserted in the same document as that which creates the tenancy. Sect. 76 implies in a conveyance by reference to the Schedule in the Act the covenant as to freedom from incumbrances, and it seems to me that that would have the effect of destroying the proviso for re-entry, but it would have no effect in destroying the personal obligation in the covenant to pay the balance of the premium. Then as to s. 63: I do not think that the personal obligation to pay the instalments of the premium is a "claim and demand . . . . in, to, or on the property conveyed." The section covers matters like covenants to repair, the covenant to pay the rent, and covenants which expressly relate to the subject-matter of the lease—namely, the land and buildings; it does not relate to that which is the original consideration for the granting of the lease.

It is said also that the respondent is not entitled to recover, because he is estopped by what happened in the action with regard to the furniture. As I read the pleadings, that action was based upon an agreement contained in the very document upon which this action is based. How that action can be said to estop the respondent from contending that the whole of the terms contained in the document which created the tenancy have not gone I cannot understand, because the action was brought on one of the terms in that very agreement which the appellant now says has come to an end. The plea of estoppel is in these terms: "The basis of the said claim was that by the said deed the said lease had been determined and the plaintiff is now estopped from alleging the contrary." In one sense the lease had been determined, because the term had come to an end by reason of the merger; but that is quite a different thing from saying that everything contained in the document which created the term had also come to an end. There is nothing in the plea of estoppel. I agree that the appeal should be dismissed.

SLESSER L.J. The judge who tried this action, in dealing with the essential point, said: "When the lease speaks of a premium it means, as indeed is apparent from the other contents of the lease itself, something entirely distinct from rent, and not on the same footing at all, but a sum which the intending lessee is prepared to give as a premium or a foregift for the privilege of obtaining a twenty-one years' lease upon certain terms as to rent and otherwise." In my opinion that exactly and aptly expresses the position of the premium in this case, and if it be right, as I think it is, it follows that a great deal of the argument is really irrelevant to what we have to decide. That view that the premium is a consideration for which the lease itself is granted, as appears clear on the face of the lease itself, is made even more clear by the fact that in the event of re-entry for non-payment of rent or premium, while only a proportionate part of the rent has to be paid up to the date of re-entry, it is expressly provided in clause 1 of the lease that all the premium unpaid up to the

Slesser L.J.

date of re-entry shall become immediately due and payable. Other provisions make it equally clear that the premium of 1000*l.* which is to be paid by instalments is not rent or anything like rent.

The only remaining matter relied upon by the appellant was that the respondent was estopped from saying that the lease had not been determined. Even assuming, however, that there is an estoppel it does not avail the appellant. The fact that the lease was determined does not assist the Court in coming to a conclusion on the question whether the premium by reason of the right of re-entry or by reason of s. 141 of the Law of Property Act, 1925, or for any other reason, is to be regarded as rent. If, as Acton J. has held, the premium is not on the same footing as rent, the fact that the lease has been determined is irrelevant. In my view he was right in holding that the premium was quite distinct from the rent, and no question of estoppel arises. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Torr & Co., for Ferrier & Ferrier, Great Yarmouth.*

Solicitors for respondent: *Bullen, Debenham, Harston & Bennett.*

J. S. H.

STUMBLES *v.* WHITLEY.

C. A.
1929
Nov. 6.

Landlord and Tenant—Demise of Hotel with fishing Rights—Expiration of Tenancy—Grant of a new Tenancy—Whether fishing Rights to be included—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 5.

Where an incorporeal right, such as a right of fishing, is demised along with corporeal hereditaments by the same lease, and the lessee uses both for the purpose of his trade or business, the incorporeal right is part of the "premises" within s. 5 of the Landlord and Tenant Act, 1927. Therefore, on the expiration of such a lease, the lessee, if he can show that the compensation for goodwill to which under the Act he would be entitled would not compensate him for the loss of goodwill if he removed to and carried on his trade or business in other premises, may require a new lease of the premises which shall include the incorporeal right demised by the original lease.

Quaere, per Greer L.J., whether a bare lease of fishing rights comes within the Act.

Appeal from a decision of the Divisional Court.

By a lease dated September 28, 1921, made between Herbert Whitley (thereinafter called the lessor), of the one part, and Arthur Bidwell and Albert Rees, of the Royal Sands Hotel, Slapton, in the county of Devon (thereinafter called the tenants), of the other part, the lessor demised unto the tenants "all that messuage or tenement and premises known as the Royal Sands Hotel, Slapton, aforesaid, ... together with the exclusive right at all times between March 3 and November 1 in each year of the tenancy (such period being hereinafter termed the summer fishing) of fishing the water known as the Lower Ley from Slapton Bridge," within specified limits, "and, secondly, the exclusive right of fishing at all times . . . . between November 2 and March 2 in each year of the tenancy (such period being termed the winter fishing)" within certain limits " . . . . to hold unto the tenants for the term of seven years from March 25, 1922, ... yielding and paying during the said term in respect of the first hereinbefore described hereditaments the yearly rent of 110*l*. . . . . and in respect of the fishing rights secondly hereinbefore described the yearly rent of 55*l*. . . . ." The benefit of the lease with the fishing rights and goodwill became vested in the plaintiff, Alfred Percy Stumbles, who on March 25, 1928, gave notice to the defendant that he required a new lease to be granted to him as from the date of the expiration of the lease, on the ground that the compensation which could be awarded to him under s. 4 of the Landlord and Tenant Act, 1927 (1), would not compensate him for the loss that he would suffer if he removed to and carried on his business in other premises. The matter was referred to a referee, who was of opinion that Slapton Ley with the fishing rights demised by the lease formed part of the premises which were used by the plaintiff for the purpose of trade or business, and from which he derived profits, and that by reason of the carrying on by the plaintiff at the premises of the trade or business of a hotel proprietor goodwill beyond that attributable to the character and situation of the premises had become attached to the premises, and that it was reasonable that a lease of the premises, including the fishing rights, should be granted to the plaintiff for a term of seven years from March 25, 1929, at a rent of 205*l.* per annum upon the terms and conditions contained in the lease.

The referee's report came before the county court judge, who declined to adopt it, as he held that the fishing rights were not "premises" within the meaning of s. 5 of the Act of 1927. (2) He accordingly remitted the matter to the

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(1) Landlord and Tenant Act, 1927, s. 4, entitles the tenant of a holding to which Part I. of the Act applies, provided he claims in the prescribed manner, at the termination of the tenancy on quitting the holding to be paid by the landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto.

(2) Landlord and Tenant Act, 1927, s. 5: "(1.) Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

"(2.) Where such a notice is so

referee to consider the fair rent of the hereditaments apart from the fishing rights.

On appeal by the plaintiff, the Divisional Court, reversing the decision of the county court judge, held that the fishing rights formed part of the premises demised, and therefore that the fishing rights should be included in the new lease.

The defendant appealed.

Barrington-Ward K.C. and *G. D. Roberts* for the appellant. The question is whether an incorporeal right of fishing can be regarded as "premises" within the meaning of that term in the Landlord and Tenant Act, 1927. Sect. 5 enables the tenant of a holding to which Part I. of the Act applies to serve on the landlord notice requiring "a new lease of the premises at which the trade or business is carried on to be granted to him." Sect. 17 defines the holdings to which Part I. of the Act applies, as "any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on thereat any trade or business. . . ." Reading those sections together it is submitted that the expression "premises" is not used in the Act in its conveyancing sense, but as meaning the physical structure in which the trade or business is carried on. This is made clear by the use of the word "thereat" in s. 17, a word quite inapplicable to the exercise of a right of fishing.

[SLESSER L.J. Does not the exclusion of mining leases from s. 17 rather suggest that other leases, for example of incorporeal rights, are included in the term "premises"? Mining leases, as appears from the definition in s. 25, may include wayleaves which are incorporeal rights.]

The exclusion of mining leases from s. 17 does not help in

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served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper. . . ."

the construction of what are "holdings" or "premises" within the Act. The object of the Act is to give the lessee a right to be in premises, that is, in buildings. This view is supported by the provision in s. 4, which enacts that in the case of licensed premises the sum payable as compensation for goodwill shall not include any addition to the value of the premises attributable to the fact that they are licensed premises. This view is also enforced by the reference, also in s. 4, to the demolition of premises, and by the provision in s. 10 enabling the landlord to enter on the holding for the purpose of executing improvements. Moreover, the Act, being an invasion of the landlord's common law rights, should be construed against the lessee rather than against the landlord.

[They referred to *Hornsey Local Board* v. *Monarch Investment Building Society.* (1)]

Topham K.C. and *Merlin* for the respondent were not called upon.

SCRUTTON L.J. This is a short point arising on the Landlord and Tenant Act, 1927, but as our decision may have far-reaching consequences I do not desire to commit myself to too wide a statement of the effect of the Act.

The facts are comparatively simple. A lease was granted in September, 1921, by Whitley, the lessor, to certain lessees who are now represented by the respondent to this appeal. The subject-matter of the lease was an hotel which is situated on an inland lake separated from the sea by a narrow belt of shingle. The inland lake offers considerable facilities for fishing, and on that account the hotel is much resorted to by fishermen. The lease describes the subject-matters under two heads: the first head is described as all that messuage or tenement and premises known as the Royal Sands Hotel, Slapton, together with the exclusive right of what may be called the summer fishing in a defined area of Slapton Ley at a rent of 110*l.*; and the second head is described as the exclusive right of fishing—called the winter fishing—within certain other limits of Slapton Ley at a yearly rent of 55*l*. That lease has now come to an end, and a claim has been made by the lessee for a new lease under the Landlord and Tenant Act, 1927, which gave for the first time, in the case of trade and business premises, a right to compensation for improvements and for the loss of goodwill on the termination of the tenancy. Another provision of the Act is that where compensation will not be a sufficient compensation for the loss of goodwill on the termination of the lease, the tenant may require, on terms to be assessed by the tribunal provided, a new lease. In this case the tenant proved that compensation under s. 4 would not be sufficient to compensate him for the loss of goodwill he would suffer if he removed to other premises, and, consequently, he asked for a new lease. The tribunal took the view that the subject-matter of the new lease should be the hotel and fishing rights. The county court judge held that the Act did not enable or entitle the tribunal to grant a new lease which would include the fishing rights. On appeal, the Divisional Court, where only one side was heard—the present appellant not appearing owing to some mistake—came to the conclusion that the tribunal was right and the county court judge was wrong, and therefore that the fishing rights should be included in the new lease. From that decision the present appeal has been brought.

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(1) (1889) 24 Q. B. D. 1, 5.

I desire to say that coming direct to this Court was, in the circumstances, a very undesirable course to take. What ought to have been done was to ask the Divisional Court for a rehearing. No doubt the present appellant would have had to pay the costs of the first hearing, which had been thrown away; but a party cannot stay away from the first two or three Courts and then claim to be heard in the ultimate appellate tribunal. However, we have heard the appeal in this case, but our action in so doing must not be taken as a precedent.

Which view is right in this conflict of opinion depends upon the true construction of the Act of 1927. I have been brought up to think that one of the matters to be regarded in construing a statute is to ascertain from the language used, and having regard to one's knowledge of the conditions prevailing at the time the Act was passed, what the mischief was which the Act intended to remedy. In *Heydon's* case (1) it was resolved by the judges that for the true interpretation of statutes four things were to be considered: "(1.) What was the common law before the making of the Act (2.) What was the mischief and defect for which the common law did not provide (3.) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth And (4.) the true reason of the remedy and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico." Lindley M.R. in *In re Mayfair Property Co.* (2) said: "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's* case (1) to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

What was the mischief which the Landlord and Tenant Act, 1927, was intended to cure? Part I. has this heading: "Compensation for improvements and goodwill on the termination of tenancies of business premises." It is well known that before the Act one of the complaints of tenants was that after carrying on a trade in premises, building up a goodwill for the house and making improvements, on the expiration of their lease the whole benefit of the goodwill and the improvements effected passed to the landlord. That was the mischief intended to be cured by the Act. Sect. 1 gives the outgoing tenant compensation for improvements effected on the trading premises, and s. 4 gives compensation for goodwill. But it was seen that there might be cases

(1) (1584) 3 Rep. 7*a*. (2) [1898] 2 Ch. 28, 35.

where that compensation would not be enough to compensate the tenant for the loss he would suffer by being turned out, and so, if he can prove that, he is given another remedy—namely, the right to require the landlord to give him a new lease upon such terms as shall be settled by the tribunal. He is to get a new lease, but of what? In my judgment a new lease of the subject-matter which he previously enjoyed. That appears to me, before I look at the words used by the Act, to be the mischief to be cured and the remedy which Parliament devised. By the Act the remedy is given to the "tenant of a holding to which this part of this Act applies." Turning to s. 17 I find that the holdings to which this part of the Act applies are premises held under a lease other than a mining lease. The argument addressed to us is that the Act applies only to "premises" held under a lease; that fishing rights are not "premises," as the right to extract fish from Slapton Ley is not a building; that "premises" are buildings or structures. Consequently, it is said, the tenant is only entitled to obtain a new lease of the buildings or structures, and not of the mere right to take something from the soil. On the other hand, there is a well-known technical use of the term "premises." In a deed the subject-matter of the grant is stated, and the habendum states the subject-matter—the premises—which has been earlier mentioned. For example, in a deed by which, after reciting that Jones is the owner of the right of fishing in Slapton Ley, Jones grants to Brown for seven years the sole right of fishing in order that Brown may carry on the trade of fishing for profit, the premises—the subject-matter of the grant—are the fishing rights. That meaning of "premises," which is well known to lawyers, has the advantage of fitting in with the purpose of the Legislature in curing the evil existing before the passing of the Act of 1927, because that purpose was that a man who would otherwise have been turned out on the termination of the lease of the premises in which he had carried on his trade or business should be restored to those rights for another term on such conditions as the tribunal might think right. That construction carries out the clear

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intention of the Legislature, while the construction which suggests that "premises" are restricted to buildings would defeat that object, inasmuch as the main value of the buildings to their owner may consist in certain exclusive sporting or fishing rights connected with them, and which constitute an attraction to people to come to those buildings. To say to the lessee, "We will restore you the rights in the hotel but will deprive you of the sole rights of fishing or sporting rights," would defeat the purpose of the Act. Endeavouring, therefore, to construe the Act according to the principle laid down in *Heydon's* case (1), I think the view which makes the "premises" relate to the subject-matter of the lease the correct one, and therefore I think that the Divisional Court was right and the county court judge was wrong.

The language of the Act is not very consistent, but some of the definitions appear to support the view I have expressed. I find, for example, in s. 25 that the expression "landlord" means "any person who under a lease is, as between himself and the tenant or other lessee, for the time being entitled to the rents and profits of the demised premises." I find in the lease that the landlord is entitled to 55*l.* as the rent of the winter rights of fishing in Slapton Ley, which fits in with the view of general construction that the word "premises" refers to the subject-matter of the lease, provided that on that subject-matter a trade or business is carried on. I see no difficulty in there being a trade or business of letting out fishing rights as carried on by the proprietor of the hotel, who has the sole right of fishing in Slapton Ley. It is, indeed, extremely common to find that one of the privileges connected with an hotel is that the proprietor has so many miles of fishing rights or so many acres of shooting rights. It may be put in another way which will limit it to this case probably. It may be said that the subject-matter of this lease is the hotel, but it is the hotel with certain rights attached to it, and that the new grant should be of the same subject-matter—namely, the hotel with those rights. That construction also accords

(1) 3 Rep. 7*a*.

with the view I take in considering the purpose of the Act. For these reasons I think the appeal must be dismissed.

GREER L.J. I agree that the appeal should be dismissed, but I gravely doubt whether the term "premises" would cover a separate and distinct lease of an incorporeal hereditament. I was much impressed by the argument on behalf of the appellant on the various sections and parts of sections of the Act of 1927, which seem to point to the word "premises" being used in the statute not with its conveyancing meaning but with the common meaning it has acquired in recent years—namely, that which it bears on notices stating that premises are to let. There it signifies the land and erections upon the land. But it does not follow from that that when a new lease is granted by the tribunal under s. 5, sub-s. 2, the terms of that lease are to be confined to the actual use of the piece of the land. It was conceded in the course of the argument that if the original lease granted a right of way to the tenant of the premises the new lease should include a grant of that right of way as part of the premises. The only difficulty in applying that to the present case arises out of the wording of the indenture. The lease is of a messuage or tenement and premises known as the Royal Sands Hotel, "together with the exclusive right at all times between March 3 and November 1 in each year of the tenancy . . . . of fishing the water known as the Lower Ley"; and secondly, "the exclusive right of fishing at all times (except as hereinafter provided)," and then it stipulates for a separate rent for the fishing rights secondly mentioned. I do not think that justifies one in coming to the conclusion that this document should be regarded as two leases—namely, a lease of the hotel and a separate lease of the fishing rights; it should be regarded as a lease of the hotel with fishing rights attached. If there had been rights of way or other appurtenances I think the tribunal would clearly be entitled to insert in the new lease a grant of the like rights. So in this case I think the tribunal was entitled to include in the new lease a grant of those fishing rights which were in the old lease.

I desire, so far as I am concerned, to reserve my opinion on the question which may possibly arise hereafter—namely, whether a bare lease of fishing rights comes within the Act.

SLESSER L.J. I agree that the appeal should be dismissed. It is unfortunate that the Legislature, in using so important a word as "premises," should not have condescended to define the sense in which it was to be read. Speaking for myself, I agree that it is probable that the term "premises" was intended to be and should be construed in its ordinary signification. It was pointed out in *Beacon Life and Fire Assurance Co.* v. *Gibb* (1) that although the word "premises," in popular language, is applied to buildings, in legal language it means the subject or thing previously expressed.

Starting, therefore, with the assumption that the word "premises" has here its ordinary signification, I look to see whether there is anything in the Act, and particularly in s. 5, to take away that meaning. It is true that s. 5, sub-s. 1, uses the phrase: "if [the tenant] removes to and carries on his trade or business in other premises"; but however that may be, I do not think that the mere fact that a trade or business is carried on in or at premises compels one to limit the meaning of the term to the mere structure or buildings. For the purposes of this case it matters not, for the fishing rights are in fact in the same lease and part of the same premises as the structure demised. I have come to the conclusion that giving even the narrower construction to the word, it is nevertheless wrong to say that an incorporeal hereditament is excluded. In the Act itself there are indications that the Legislature intended to include incorporeal rights. This is indicated in various ways: first, in the definition of "landlord," and, secondly, in the exclusion of mining leases from leases under the Act. When the definition of a mining lease in s. 25 is looked at it will be found to include the right to carry away and dispose of mines and minerals, thus referring to wayleaves, which are incorporeal rights, and the inference is strong that incorporeal rights are included in leases coming within the Act. In my view Parliament intended that in such a case as this incorporeal rights were to be included in the new lease which the tenant is entitled to require. I think therefore the Divisional Court was right.

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(1) (1862) 1 Moo. P. C. (N. S.) 73.

Appeal dismissed.

Solicitors for appellant: *Philip Conway, Thomas & Co., for Harold Michelmore & Co., Newton Abbot.*

Solicitors for respondent: *Neve, Beck & Crane.*

J. S. H.

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[1928. C. 4274.]

Negligence—Contributory Negligence—Direction to the Jury.

In an action for personal injuries alleged to have been caused by the negligence of the defendant, if there is evidence of an act of negligence on the part of the plaintiff without which the accident would not have happened, the judge at the trial should direct the jury that if they should think that the plaintiff was negligent, but the defendant, after the plaintiff was negligent, could by taking reasonable care have avoided him, then the plaintiff's negligence is not as a matter of law negligence which contributes to the accident so as to prevent the plaintiff from recovering.

Davies v. *Mann* (1842) 10 M. & W. 546 and *Radley* v. *London and North Western Ry. Co.* (1876) 1 App. Cas. 754 followed.

Question touched in dictum in *Service* v. *Sundell* (1929) 46 Times L. R. 12 reserved for future consideration.

Appeal from the judgment of Humphreys J. in an action tried before the learned judge and a special jury.

The action was brought under the Fatal Accidents Act, 1846. The plaintiff's husband had been killed in a collision between his motor bicycle and the defendant's motor car. The circumstances in which the accident happened are more particularly stated in the judgment of Scrutton L.J. The following short summary will show the nature of the case.

At a point known as Stump Cross the main road from Newmarket to London crosses a less important road running

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from Saffron Walden to Cambridge. On Wednesday, July 15, 1928, at about 5.15 P.M., the defendant returning from Newmarket to London was approaching Stump Cross in a south-westerly direction in a motor car travelling at about thirty miles an hour. The plaintiff's husband, a man of about sixty years of age, was riding home after his day's work from Saffron Walden to Cambridge on a motor bicycle at about ten miles an hour and approaching the cross roads in a north-westerly direction. The two vehicles collided in the Newmarket road. When he was about eleven yards from the point of impact the defendant put on his brake, but failed to avoid the accident. The jury under the direction of the learned judge, the material parts of which are set out in the judgment of Scrutton L.J., found a verdict for the defendant.

The plaintiff appealed.

Doughty K.C. and *A. Aiken Watson* for the appellant contended that the learned judge had failed to direct the jury adequately on the matter of contributory negligence in not explaining to them, in accordance with the law laid down in *Davies* v. *Mann* (1) and *Radley* v. *London and North Western Ry. Co.* (2), that even if they should find the deceased man had been guilty of an act of negligence in entering the main road as he did, yet if they should also be of opinion that the respondent could, after that act of negligence, by exercising reasonable care, have avoided the accident, then the negligence of the deceased man was not contributory negligence in the sense in which the law uses those words.

Flowers K.C. and *Berryman* for the respondent insisted that the evidence did not raise the question, who had the last opportunity of avoiding the accident; for that the deceased man had come out of the Saffron Walden road so suddenly that the respondent had no opportunity of avoiding him.

Reynolds v. *Thomas Tilling, Ld.* (3) and *Admiralty Commissioners* v. *S.S. Volute (Owners)* (4) were cited.

(1) 10 M. & W. 546; 2 Sm. L. C., 13th ed. (1929), p. 576.

(2) 1 App. Cas. 754.

(3) (1903) 19 Times L. R. 539; on appeal 20 Times L. R. 57.

(4) [1922] 1 A. C. 129.

SCRUTTON L.J. The Court is compelled, with some reluctance, to order a new trial in this case. There is at the present time a great deal of litigation concerning collisions between motor cars and motor cycles, motor cars and pedestrians, and motor cars between themselves, and it is therefore very important that judges who have to try these cases should have some standard form which they can apply in directing juries, with whom the final decision lies, upon the questions they have to decide.

Keeping to the facts upon which there is no dispute, the accident happened at a point where the road from Cambridge to London joins the road from Newmarket to London in a form resembling the letter Y, the left hand arm of the Y coming from Cambridge and the right hand branch coming from Newmarket, and the two branches meeting at an angle. A person coming from Cambridge can, if he wishes, go across the road from Newmarket to London and into a comparatively small road which leads to Saffron Walden. The deceased man riding a motor cycle was coming from Saffron Walden, intending to cross the Newmarket road to go along the road to Cambridge, which came in on the other side. It is clear from the photographs put in evidence that the road from Saffron Walden enters the Newmarket road in an inconspicuous way. It is a small road, and vehicles in it are not readily visible from the Newmarket road. The deceased man on his motor cycle came out of the Saffron Walden road into the Newmarket road. When he did so, the defendant's car coming from Newmarket to London was comparatively close to the cross roads and was going at a pace of about thirty miles an hour. The cycle and the car came into violent collision; the cyclist was killed, and his widow brings the action. The defendant had put on the brakes about eleven yards before the point of collision.

It is clear law that if the deceased man was negligent in coming out from this side road into the main road at the pace at which he was going, yet if the defendant could, when he saw the bicycle, by using reasonable care have avoided it, the cyclist's negligence is not such as to prevent him from recovering. That is the principle laid down in *Davies* v. *Mann*. (1) The fact that the unfortunate victim in that case was a donkey in no way affects the principle of law, which applies to all these cases where there is negligence on both sides. It is illustrated by the hypothetical case of a drunken man sitting down in a road regardless of the traffic. If he does that and a driver of a motor car sees him sitting there, and apparently intending to continue so doing, and sees him at a distance which would enable the driver to avoid him by using reasonable care, the driver cannot say: "Your negligence contributed to the accident so that you cannot recover." If a foot passenger without looking should step into the road within a yard of an advancing motor car, no one could suggest that the driver could by reasonable care avoid him; but if a foot passenger without looking were to step into the road fifty yards in front of the motor car, in broad daylight, on a straight road, with no vehicles upon it, there the driver of the car who runs into him could obviously by reasonable care have avoided the consequence of the foot passenger's negligence and is not entitled to say: "Your negligence contributed to the accident." Therefore in any case, where the evidence shows negligence on both sides and the question is whether the plaintiff was guilty of contributory negligence, the jury should be directed in plain terms: "If you think that the plaintiff was negligent, but that the defendant, after the plaintiff was negligent, could by taking reasonable care have avoided him, then the plaintiff's negligence is not as a matter of law negligence which contributes to the accident so as to prevent the plaintiff from recovering." Attempts have been made to devise a simple expression which would convey to juries and others this well settled doctrine of the law; expressions such as the "real" cause and the "effective" cause have been used. In the present case the learned judge tried to get the jury to say what was the "substantial" cause. A judge who uses such phrases should explain to the jury: first, that the real or effective or substantial cause may be the combined negligence of both parties, and that it is not necessary for them to select one as the guilty party if they think that the accident was caused by the combined negligence of both; and secondly, that negligence in the plaintiff does not prevent him from recovering if the defendant, after it happened, could by reasonable care have counteracted it.

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(1) 10 M. & W. 546; 2 Sm. L. C., 13th ed. (1929), p. 576.

That being the law, in the present case counsel for the plaintiff contended before the jury that even if the cyclist was negligent in the way in which he came into the main road, yet the defendant by swerving to one side or the other might have avoided him; while counsel for the defendant insisted that the cyclist came into the main road so suddenly that the defendant could not by using reasonable care have avoided him. The learned judge in his summing up said: "If the deceased man had been injured and not killed, would you find upon the evidence in this case that he was entitled to damages against the defendant because of the negligence of the defendant? If so you will find a verdict for the plaintiff. If you find that the injuries from which this man undoubtedly suffered were not caused by negligence on the part of the defendant, then there is an end of the case, because the plaintiff has to satisfy you that the plaintiff is entitled to damages. The onus is on the plaintiff. Then there is another possibility. Supposing you find that the defendant was negligent, and that it was to some extent his negligence which caused the injuries from which the deceased man died, if you should also come to the conclusion that it was substantially also owing to the negligence of the deceased man himself that the accident occurred, so that both parties were, I will not say equally, but substantially, to blame for the accident, then again you must find a verdict for the defendant, because the law is that even if you are injured by somebody else's negligence, yet, if you substantially contribute to those injuries by your own negligence, you cannot recover damages from the other person. Now that is the issue you have to try. You have got to consider, first of all, are you satisfied that the defendant was negligent in such a way as to cause this collision which caused the injuries? If so, are you of

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opinion that the deceased man was guilty of contributory negligence ?" That seems to be a direction to the jury that if they should find the deceased man was guilty of negligence, which substantially contributed to the accident, they should find for the defendant, but it contains no statement or suggestion that, though they should find that the deceased man had been guilty of negligence, if they should also be of opinion that the defendant could, by exercising reasonable care after the deceased man's act of negligence happened, have avoided its effect, then the negligence of the deceased man was not contributory negligence in the sense in which the law uses those words. The learned judge then, after a very careful and complete examination of the evidence, said: "Now there it is. That is the evidence, and it is upon that evidence, as it seems to me, that you will have to make up your minds upon the two things which I have told you are really the material questions in this case; (*a*) Was the accident caused by the negligence of the defendant: (*b*) if so, was the accident contributed to by the negligence of the deceased man ?" That merely repeats, without using the word "substantially," what he had said before. The jury then retired to consider their verdict. After forty minutes they returned into Court, and the foreman said: "I should like to ask, my Lord, whether you could give us any help as to what you meant by 'substantial contributory negligence.'" That gave the learned judge an opportunity of telling the jury that if the deceased man was guilty of negligence, but the defendant, after he saw it, could by reasonable care have avoided it, there was no substantial contributory negligence on the part of the deceased man. But what he said was: "Assuming that you found that the defendant was negligent and that he was so negligent that you could say that the accident was caused by his negligence, if you also come to the conclusion that the plaintiff was so negligent that you can say the accident was really caused by the negligence of both of them"—that merely substitutes "really" for "substantially"—"then there is negligence which contributed to the accident." That fails to tell the jury that though the case began with a negligent act on the part of the cyclist, yet if the defendant could, after he saw it, by reasonable care have avoided it, then the cyclist had not really or substantially "contributed to the accident" within the meaning which the law attaches to those words. The summing up continued: "I do not think I can really help you more than that. If the defendant was negligent and the deceased man was negligent, but the deceased man's negligence was only to this extent, that he did not do the absolutely ideal thing at the moment, that would not be contributory negligence on the part of the deceased man." That appears to be a reference to the doctrine of the "agony" of the collision. (1) Then the learned judge added: "It really comes to this: If you find that the accident was due to the negligence of both parties substantially, then that would be contributory negligence on the part of the deceased man. I do not know that I can help you further than that; it is a question which the jury have to decide. There is no real definition of contributory negligence, and I think you will agree it really comes to a matter of common sense. It may be you think that the deceased man did not do everything that was absolutely right. That would not be sufficient to disentitle the plaintiff to damages. But if you say that, although the defendant was negligent, so was the dead man, so that they were both to blame, then you could not find for the plaintiff; you would have to find for the defendant." That again omits to add the vital qualification, that if, though both were negligent, the defendant could by reasonable care, after the negligence of the deceased man, have avoided his negligence, they should still find for the plaintiff.

At this point counsel for the plaintiff intervened and asked, "Does not the question arise, who was guilty of the last act of negligence?" In answer to which the learned judge said: "Not necessarily. Whose negligence was it that substantially caused the injury?" The jury retired again for ten minutes, and then returned a verdict for the defendant.

(1) "In the very agony," James L.J., *The Bywell Castle* (1879) 4 P. D. 219, 222.

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Counsel for the respondent has argued in this Court that it was not necessary to ask the jury the question based on *Davies* v. *Mann* (1), whether, supposing the deceased man was negligent in coming into the Newmarket road at the speed at which he was riding, the respondent could by reasonable care have avoided him; because, he urged, within so short a space as eleven yards it was impossible by swerving or otherwise to avoid a collision; and the judge must have known that, and so ought to have held that there was no evidence on which the jury could find that the respondent by the exercise of reasonable care could have avoided it. In my opinion a judge would not be justified upon the facts proved in this case in removing from the jury the question whether eleven yards were or were not sufficient to enable the respondent to avoid this collision.

One further matter I wish to mention. In the condensed report of *Service* v. *Sundell* (2) I am reported to have said that, "With regard to the case of a motor car running too fast, and a foot passenger stepping into the road without looking where he was going, so that the motor car could not avoid him though it could have done so if it had been going at a reasonable speed, neither, in his"—i.e., my—"opinion, should recover, because the negligence of each contributed to the accident." If I said that—and I seem to have said something like it—I said it by inadvertence, and the passage does not represent my considered opinion. What I intended to convey was that I desired to reserve my judgment upon the question whether the Supreme Court of Judicature in this country should or should not follow *British Columbia Electric Ry. Co.* v. *Loach.* (3)

GREER L.J. In this case the appellant, the plaintiff below, asks for a new trial on the ground that the learned judge failed to direct the jury upon what is known as the rule in *Davies* v. *Mann* (1), and I also have come with reluctance to the conclusion that there must be a new trial. Moreover,

(1) 10 M. & W. 546.

(2) 46 Times L. R. 12.

(3) [1916] 1 A. C. 719.

I agree that in most cases where contributory negligence is pleaded it is necessary to give a careful direction to the jury upon the application of the rule. I cannot pretend to improve upon the words my Lord has used in stating what that direction should be. I agree in his statement entirely.

The appellant set out by her statement of claim to establish that the respondent by his negligent driving caused the death of her husband. The respondent by way of defence said: "I was not negligent at all; but if I was, my negligence was not the cause of your husband's death. The cause of his death was the joint negligence of him and myself." If the respondent established either of these pleas he succeeded; but he had to make out one or the other. On a plea of contributory negligence the onus of proof lies upon the defendant, and he does not discharge that onus merely by proving that the plaintiff was negligent, because the plaintiff's negligence may be so remote that it may not be what the law considers the cause of the injury complained of.

Logically and theoretically the question in every running down case is: "Was the defendant's negligence the sole cause of the collision?" and, speaking for myself, I see no objection to asking the jury to determine whether it was the negligence of the defendant that was solely responsible for the injury and damage complained of; but asked baldly it may be very misleading, and I think it is necessary for any judge summing up to give some explanation of what the law regards as the sole cause by telling them that where the plaintiff by being negligent himself has contributed to the accident in the sense that without his negligence it is true the collision would not have happened, still the defendant's negligence may be the real cause of the collision, notwithstanding the plaintiff's act of negligence. The way to explain this is to direct them on the lines laid down by *Davies* v. *Mann* (1); *Radley* v. *London and North Western Ry. Co.* (2); and numerous other cases, by saying that, notwithstanding the plaintiff's negligence, if the jury come to the conclusion upon the evidence that the defendant was negligent towards

(1) 10 M. & W. 546. (2) 1 App. Cas. 754.

the negligent plaintiff, when he had a reasonable opportunity of avoiding the consequences of the plaintiff's negligence and did not take advantage of that opportunity, he caused the injury and damage by not treating with due care a man who he knew was acting negligently.

Now there are exceptional cases in which the judge at the trial may rightly come to the conclusion that the negligence of both parties continued up to a point when it became impossible for either party to avoid the consequence of the other's negligence. In these cases I should not be inclined to criticize the summing up of a judge who said nothing to the jury about the conduct of the party who had the last opportunity of avoiding the negligence of the other party. But those cases are very exceptional. In the present case the learned judge said nothing at all upon this aspect of the case; he was invited by counsel for the plaintiff to direct the jury upon it, but he declined to do so, and only put to them the questions, whose negligence caused the accident? and, was the defendant's negligence the substantial cause of the injury? That is much the same as asking, who do you think ought to pay for this accident? It might have been a reasonable and sensible course to lay it down as law that this was the proper way in which juries should be asked to decide these questions; but ever since *Davies* v. *Mann* (1) and *Radley* v. *London and North Western Ry. Co.* (2) it has been accepted as the law of this country that the proper direction to the jury in a case of this kind is to tell them that the defendant may still be responsible if he could, after the plaintiff's negligence, by the exercise of reasonable care and diligence, have avoided the consequence of the plaintiff's negligence. We were very properly pressed by counsel for the respondent to say that this was one of those exceptional cases where it was not necessary to give that direction to the jury, because when these two vehicles came within sight of one another both were guilty of negligence, but neither discovered the negligence of the other until it was too late to avoid a collision, as in the case I put during the argument,

(1) 10 M. & W. 546.

(2) 1 App. Cas. 754.

where the drivers of two converging vehicles cannot see each other until they are about a yard apart, when in fact neither could possibly do anything to avoid an accident. If the present case was one of that class I do not think it could be said that the direction was insufficient. And indeed the present case is not far from being one of that class, and at first I was impressed by the argument of counsel for the respondent, but on consideration I have come to the conclusion that it cannot prevail. The brake of the respondent's car was applied at a point eleven yards distant from the point of impact, and the jury, if they had considered the question, might have said that when the brake was put on the respondent saw the bicycle and appreciated the possibility or probability of a collision. Moreover they might on the evidence have taken the view that the respondent either saw or ought to have seen the deceased man coming out of the side road from a distance more than eleven yards from the point of impact. In these circumstances I find it difficult to say that it would have been impossible by the exercise of reasonable care to have turned to the right and so have avoided the collision. It must be remembered that on appeal from the decision of a judge and jury, judges of the Court of Appeal are not judges of fact, and we have not to decide what we might have to decide if we were judges of fact. In the present case we have only to decide whether in the circumstances the jury might have come to the conclusion that the respondent by exercising reasonable care could have avoided the dead man's negligence. The crucial question in a case is often a question of degree. The facts proved in a case may point definitely to an inference on one side or on the other side of a dividing line; but there are also cases in which it is doubtful on which side the inference should fall. If the case is tried by a jury the inference must in my opinion be drawn by the jury and not by the judge. I think this is one of those cases. Upon the facts in *Reynolds* v. *Thomas Tilling, Ld.* (1), cited by Mr. Flowers for the respondent, there was no question of the defendant having an opportunity of avoiding the consequence of the plaintiff's negligence. It was one of those exceptional cases where the evidence does not admit of the contention that the defendant could, by the exercise of reasonable diligence, have avoided the negligence of another person, and therefore in my opinion the decision has no application to the facts in the present case.

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(1) 19 Times L. R. 539; affirmed 20 Times L. R. 57.

SLESSER L.J. I agree that there must be a new trial. In my opinion the questions which the jury had to consider were not pointed out to them with sufficient clearness to enable them to bring their minds to bear properly upon the facts. I would refer to one vital passage in the summing up of the learned judge. He said: "Supposing you find that the defendant was negligent and that it was to some extent his negligence which caused the injuries from which the deceased man died, if you should also come to the conclusion that it was substantially also owing to the negligence of the deceased man himself that the accident occurred, so that both parties were—I will not say equally, but substantially—to blame for the accident, then again you must find a verdict for the defendant, because the law is that even if you are injured by somebody else's negligence, yet, if you substantially contribute to those injuries by your own negligence, you cannot recover damages from the other person. Now that is the issue you have to try." This direction ignores the consideration that the defendant will still be liable if he could by using reasonable care have avoided the accident, notwithstanding the previous negligence of the plaintiff; or, as it has also been expressed, if the last reasonable opportunity of avoiding the accident lay with the defendant and he failed to take advantage of it. That principle is recognized and expressed in *Davies* v. *Mann*. (1) It is not disputed that the proper direction, which has been stated by my Lord in words which I will not run the risk of obscuring by any attempt to gloss them, was never given to the jury. Yet in my judgment it was a question of real substance whether the driver of the motor car had or had not the penultimate opportunity, before the "agony of the collision," of swerving or passing to the off side and so avoiding the collision. As there is to be a new trial, it is most important to refrain from expressing an opinion either way which might possibly influence the freedom of opinion of the new jury; but that there is a substantial question to be decided one way or the other appears to be quite clear.

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(1) 10 M. & W. 546.

Counsel for the respondent seeks to justify the omission of the learned judge to give the direction based on *Davies* v. *Mann* (1) by contending that in the circumstances of this case as disclosed by the evidence no such last opportunity ever arose. There may be cases, though they must be few in number, where that argument would be well founded, and where the evidence is so cogent and consistent as to raise no question for the jury upon this head. But after reading the evidence and the summing up I cannot accept the view that any such reason as that weighed with the learned judge or was ever presented to him. There seems to have been an omission of all reference to the rule in *Davies* v. *Mann* (1), rather than a consideration of that rule and a rejection of it on the ground that any last opportunity of avoiding the negligence of the deceased man was excluded by the evidence. On the contrary there is evidence that the cyclist on entering the main road turned to the left, while the respondent went straight on. In my view there was here matter raising the question of a last opportunity which ought to have been left to the jury. I agree therefore that there must be a new trial.

Appeal allowed.
New trial ordered.

Solicitors for appellant: *William Easton & Sons.*
Solicitors for respondent: *Berrymans.*

W. H. G.

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(1) 10 M. & W. 546.

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Oct. 22, 23, 24, 25; *Nov.* 11.

SILVER *v.* OCEAN STEAMSHIP COMPANY, LIMITED.

[1928. S. 871.]

Shipping—Bill of Lading—Goods "shipped in apparent good order and condition"—Damage—"Insufficiency of packing"—Estoppel.

The incorporation of the provisions of the Carriage of Goods by Sea Act, 1924, in a bill of lading stating that the goods have been "shipped in apparent good order and condition" does not affect the obligation of the shipowner to deliver the goods in the like good order and condition unless he can prove facts bringing him within an exception excluding his liability, or can show that damage has been occasioned through some cause which was not apparent on a reasonable examination of the goods when shipped.

A shipowner who signs a bill of lading for goods "shipped in apparent good order and condition" is estopped as against the holder of the bill of lading from alleging that the goods, in respect of matters externally visible on a reasonable examination, were not in good condition when shipped; and (per Scrutton and Slesser L.JJ.) is further estopped from alleging that by reason of the particular nature and shape of the containers in which the goods are placed damage to the goods has been caused by "insufficiency of packing" within Art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, where the nature and shape of the containers were apparent on the shipment of the goods.

Query, per Greer L.J., whether the statement in a bill of lading that goods have been "shipped in apparent good order and condition" has any reference to original defects of quality or type.

The fact that the holder of a bill of lading containing the statement that the goods were "shipped in apparent good order and condition" takes it without objection as a clean bill of lading is sufficient evidence that he relied upon it.

Compañia Naviera Vasconzada v. *Churchill & Sim* [1906] 1 K. B. 237 followed.

Gould v. *South Eastern and Chatham Ry. Co.* [1920] 2 K. B. 186 distinguished by Slesser L.J.

Appeal from a decision of Roche J.

The plaintiff claimed damages for breach of contract and/or duty in the carriage of goods by the defendants' steamship *Æneas*.

By two bills of lading dated at Shanghai May 25, 1927, of which the plaintiff was indorsee, the defendants acknowledged to have been shipped on board their steamship the *Æneas* two parcels consisting respectively of 16,000 and

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5334 cans of frozen eggs for carriage from Shanghai to London. The bills of lading, which were in the same form, stated that the cans were "shipped in apparent good order and condition" and were to be delivered "subject to conditions and exceptions both general and special" thereinafter mentioned; they further stated that they were subject to the Rules contained in the Schedule to the Carriage of Goods by Sea Act, 1924. Clause 18 of the bills of lading was as follows: "The following are not to be deemed sufficiently packed: .... (*d*) Unprotected pieces." The plaintiff alleged that a very large number of the cans were, when delivered, damaged in that they were gashed and/or perforated and/or punctured and the contents depreciated in value, and he claimed the sum of 3544*l*. 6*s*. 5*d*. as damages.

The defendants denied that the cans in fact were shipped in good order and condition, and they denied that there was any failure to deliver them in the same condition as when shipped. If any of the cans were delivered damaged that damage, they said, arose or resulted from the act or omission of the shippers, or from the inherent defect or quality or vice of the goods, or from the insufficiency of packing. While denying liability the defendants brought into Court 350*l*., which they said was sufficient to answer the plaintiff's claim.

By his reply the plaintiff said that the defendants having acknowledged the receipt of the goods in apparent good order and condition were estopped from denying as against him that the goods were not in apparent good order and condition. He further said that it was or should have been apparent to the defendants that the tins containing the goods were slippery, square in shape, and had sharp corners, and were not covered with fibre or Russian cloth or cardboard, and that the defendants accepted the goods in that condition, and having given clean bills of lading were not entitled to contend that the damage was due to the inherent defect, quality or vice of the goods or to insufficient packing.

The facts relating to the packing and method of loading the cans, the examination to which they were subjected, and their discharge, are fully stated in the judgments. Shortly stated, the facts were that the cases or cans in which the liquid content of the eggs was contained were of thin metal, of rectangular shape, holding 42 lbs., and were not covered with any cloth, fibre or cardboard. It was more usual to have such cans covered, but in this instance the uncovered rectangular cases of the particular size were used at the request of London purchasers. The cases on arrival alongside the ship at Shanghai were stowed on trays—eighty-four tins on each tray—and hoisted on to the deck, where a ship's officer examined the cases to see if any of them were damaged; the trays were then lowered into the hold and each case was individually handled by the stowing gang, and if any damage was seen in that process the damaged cases were rejected. Some cases were in fact rejected at this stage. In London the cases were discharged in nets, in which they were jumbled together, and in this way received damage.

Roche J. found that a large number of the cases were dented or perforated, some of the perforations being "gashes," and some merely pinholes; that these perforations were caused inevitably by the handling of the uncovered cases whose sharp edges came in contact with each other; that the packing was insufficient; that the damage was done at each stage of the transit, that is, from the cold stores at Shanghai to the delivery to the consignee in London; that the smaller perforations in the cases were not apparent when loaded owing to their being encrusted with rime; that there was no want of care by the ship in the loading or carrying of the cases, but that there was negligence in the discharge by nets; that the damage thus caused in the discharge amounted to 10 per cent. of the total consignment, or 350*l.* in value; that the plaintiff was entitled to this sum which the defendants had paid into Court, with costs up to the time of payment in, but that the defendants were entitled to their costs since the date of payment in.

The plaintiff appealed.

Clement Davies K.C. and *G. St. C. Pilcher* for the appellant. Rule 2 of Art. III. of the Schedule to the Carriage of Goods by

Sea Act, 1924, is absolute: "Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The carrier can only excuse himself by one of the exceptions in Art. IV. The respondents are estopped from denying that the goods were, as described in their bill of lading, "shipped in apparent good order and condition": *Compañia Naviera Vasconzada* v. *Churchill & Sim* (1); *Martineaus* v. *Royal Mail Steam Packet Co.* (2); *The Tromp* (3); *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (4) And though they may disclaim all knowledge of the contents or quality, weight or quantity, still they are bound to carry safely the goods received by them whatever their contents or quality may be: Scrutton on Charterparties, 12th ed. (1925), p. 171, art. 52; Carver on Carriage by Sea, 7th ed. (1925), s. 14, p. 18, citing *Stuart* v. *Crawley* (5); and compare *Notara* v. *Henderson.* (6) The goods in this case were not delivered in apparent good order and condition. The onus lies on the respondents to bring themselves within one or more of the conditions exempting them from liability which are specified in Art. IV.: *Gosse Millerd* v. *Canadian Government Merchant Marine.* (7)

Porter K.C. and *James Dickinson* for the respondents. Roche J. has found that the shipowners were not negligent at any stage of the carriage except in respect of the discharge by nets. He also found that the goods were insufficiently packed, and in respect of damage caused by reason thereof the shipowners are exempted from liability: Art. IV., r. 2 (*n*), of the Schedule to the Carriage of Goods by Sea Act, 1924. There is no finding of any want of observation by the ship's officers in not recognizing that the packing was insufficient. The appellant knew of the shape of the cases in which the goods were packed and knew also that they had no covers. He cannot therefore be heard to complain of their shape and uncovered condition. Moreover, the statement as to the apparent order and condition of the goods required by Art. III., r. 3, of the Schedule to the Act of 1924 is a statement of fact, and as such cannot be relied upon by the person who receives the goods unless all the conditions enabling him to rely upon an estoppel are fulfilled. The conditions, so far as this case are concerned, are (*a*) that he must have relied upon the statement, and (*b*) that he must have changed his position by relying upon the statement. Here there was no evidence that the appellant relied upon the statement or changed his position by relying upon it.

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(1) [1906] 1 K. B. 237.
(2) (1912) 17 Com. Cas. 176.
(3) [1921] P. 337.
(4) [1924] 1 K. B. 575.
(5) (1818) 2 Stark. 323.
(6) (1872) L. R. 7 Q. B. 225.
(7) [1929] A. C. 223.

[*Evans* v. *Webster (James) & Bros., Ld.* (1) was referred to.]

Clement Davies K.C. in reply. Where the owner of goods proves that the goods have been delivered in a damaged condition it is for the shipowner to bring himself within the specified immunities: per Wright J. in *Gosse Millard* v. *Canadian Government Merchant Marine* (2); see also per Lord Sumner in *Bradley & Sons* v. *Federal Steam Navigation Co.* (3) Here the shipowners acknowledged to have received the goods in apparent good order and condition and have failed to bring themselves within any of the exceptions entitling them to immunity. It is said that the appellant is not entitled to say that the shipowners are estopped in the absence of evidence that the appellant relied upon the statement in the bill of lading that the goods were received in apparent good order and condition. As to that the appellant looked to see whether he was given a clean bill of lading and finding that he was he parted with his money. That is sufficient.

Cur. adv. vult.

1929. Nov. 11. The following judgments were read :—

SCRUTTON L.J. This appeal relates to damage done to a large shipment of Chinese eggs while in course of transit from China to London. The transit was from shippers' warehouse in Shanghai to cold stores in London, the defendants' ship being only responsible from delivery on board in Shanghai to delivery overside in London. The liquid content of the eggs was contained in metal cases holding 42 lbs. each, cases of a rectangular shape, and, therefore, with twelve right-angled edges. The cases were not covered with any cloth, fibre or cardboard covering. The contents were frozen and the cases carried in refrigerated holds. The more usual method of conveyance was either in rectangular cases covered with some kind of covering, or in circular drums which were sometimes uncovered. In this case the rectangular cases of the size in fact used were used at the request of London purchasers for reasons connected with their own business. They were probably uncovered for cheapness. As to shape, rectangular cases were obviously better for the ship's stowage, as cylindrical cases wasted room in stowage. But the right-angled edges were probably more likely to damage other goods even in careful stowage and handling; and were certainly more likely to do so if there was negligent handling. There was in the whole transit from shippers' warehouse to store very considerable damage to the cases. None of it was due to failure of refrigeration. But out of 21,334 cases shipped, 10,982 cases were damaged in their metal coverings, so that London purchasers rejected them. The damage varied in degree, but when experienced checkers at the stores tallied them in at Nelson's Wharf, 1038 were damaged out of 5334; at Bermondsey Cold Store out of 16,000 cases, 1732 were recorded as specially damaged. When the goods were more carefully examined and the two parcels taken together, out of 21,334 cases 2499 were classed as heavy and exceptional damage on which 1337*l.* 5*s.* 3*d.* was claimed and 8433 were classed as slight damage, in all nearly 11,000 cases were damaged out of 21,334. These figures are nearly accurate, but owing to some small parcels being dealt with in various ways, are only to be taken as approximate. They show heavy and unusual damage, and the question is where was it caused, and is the ship responsible to any and what extent for it? The cases go through a number of stages between shippers' warehouse and London stores, and one difficulty is that witnesses at each stage deny that any damage was caused at their particular stage. Yet at the end of the transit there was this very large damage. The judge below has not accepted the evidence of any of the witnesses who say there was no damage at their particular stage and finds, as I understand him, that there was damage at every stage, though not necessarily damage for which the ship was responsible. The cases are surveyed by Lloyd's surveyor in shippers' store and are then taken down to the ship's side by insulated van and lighter. This is stage one. Stage 2: The cases are hoisted on trays over ship's rail and placed on ship's deck, whence, after casual examination, they are lowered into ship's hold and stowed one by one in tiers. Stage 3 is the transit from loading to commencement of discharge, the voyage. There is no suggestion of any special bad weather on the voyage, and I do not think either side suggests any special damage in this stage. Stage 4 is discharge from the ship's hold to the consignees' insulated barges. Stage 5 is carriage by the insulated barges to the wharf and discharge there. Stage 6 is carriage by insulated vans to the cold store. I understand the learned judge to find that 50 per cent. of damage was caused before discharging commenced, described in the evidence as "old damage," and that none of it was caused by negligence of the ship's men in loading. This must apparently mean that in the judge's view this 50 per cent. was made up of damage before loading, for which the ship is not responsible, and damage in loading resulting from insufficiency of packing, for which again the ship is not responsible. The judge finds damage in discharging for which the ship is responsible, in that the ship's people negligently discharged the cases in nets, during which process the cases were unnecessarily flung about. He assesses this damage as not exceeding 10 per cent. of the total damage assessed in money. This leaves 40 per cent. of the damage to be accounted for, in his view, either after discharge from the ship or in discharge due to the nature of the packages without negligence on the part of the ship. There is very specific evidence about the negligence in discharging in nets and the damage thereby caused; there is not much evidence as to the amount of damage at any stage (except that as to ultimate total damage both in number of cases and in money loss, which damage has to be accounted for somehow) to enable the damage to be divided between the various persons who may be liable for it. I think any conclusions as to the amount of damage at any stage must be in the nature of a jury estimate made on very slight materials, and I should be very slow to interfere with the estimate of the judge below, unless I thought the estimate was very substantially wrong, or was vitiated by erroneous views on legal considerations. The plaintiff, the appellant, submits that he has been awarded far too little in getting 10 per cent. only of the actual damage sustained. It is necessary therefore to go in detail into the various stages with the legal considerations affecting them.

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(1) (1928) 34 Com. Cas. 172.

(2) [1927] 2 K. B. 432, 435, 436.

(3) (1927) 27 Ll. L. Rep. 395, 396.

The transit begins with a survey of the cases by Lloyd's surveyor at the shippers' refrigerating store on May 23 and 24. The survey describes the cases as "strong rectangular tins—no fibre or other cover." Tins, 150 in number, were weighed, others taken at random, sounded, and found solid frozen. The cargo is certified as "fit for transportation." It cannot be said that there is any individual examination of the cases for perforations or punctures. The cases then go down in insulated vans to be loaded into insulated barges and taken alongside the ship. All refrigerated cargo at that time of year is loaded at night, but the ship has clusters of electric lights on deck and in the insulated hold. Alongside the ship the cases are stowed on a tray with some side protection, 84 tins in each lift, in a block seven cases long, three cases wide and four cases high. It is obvious that in the block of 84 tins, having 504 sides, only 81 sides in the block are externally visible. When the tray is landed on the ship's deck, a ship's officer taps the external tins to see if they are frozen, and if he sees any damage to the tins rejects the damaged tins. The tray is then lowered into the hold and each tin is individually handled by the stowing gang, and if any damage is seen in that process the tin is rejected. In fact a small number of the original 21,334 tins were rejected at this stage, the shippers say 50, the ship 60. It is not clear whether they were replaced by sound tins, but 21,334 cases seems to be the total shipment.

Then comes the stage which raises the first question of law. On May 25 a bill of lading is signed stating that a number of tins are shipped "in apparent good order and condition." After issuing such a bill can the ship prove that at that time: (1.) the tins were perforated or punctured, or (2.) that they were insufficiently packed, or must it be taken that on shipment the tins, so far as reasonable inspection would discover, were not perforated or punctured and were by all reasonable inspection sufficiently packed? The Carriage of Goods by Sea Act, 1924, only directly applies to carriage of goods from Great Britain abroad, not from abroad, e.g., China to Great Britain. But the bills of lading by which the shipowner acknowledges the receipt of goods are for 16,000 and 5334 cases respectively, in apparent good order and condition, "for delivery subject to conditions and exceptions hereinafter mentioned," and the first condition mentioned is "This bill of lading is subject to the Rules contained in the Schedule to the statute of the United Kingdom of Great Britain and Northern Ireland entitled the Carriage of Goods by Sea Act, 1924, hereinafter referred to as 'the Rules.'" Though the Act does not apply to this bill the parties have apparently by agreement made the Rules in the Schedule to the Act conventional terms of the bill of lading. Rule 3 of Art. III. of the Schedule requires the carrier to issue a bill of lading showing the apparent order and condition of the goods, which by r. 4 is to be prima facie evidence of the receipt of goods as described.

Two questions seem to arise at this stage. First, under the law prior to the Carriage of Goods by Sea Act, 1924, a shipowner who received goods which he signed for "in apparent good order and condition" to be delivered in the like good order and condition, and who delivered them not in apparent good order and condition, had the burden of proving exceptions which protected him for the damage found. The present bill of lading runs "Shipped in apparent good order and condition for delivery subject to Conditions," etc. Has any difference been made in the old law by this wording? In my opinion no difference has been made. I agree with the view expressed by Wright J. in *Gosse Millard* v. *Canadian Government Merchant Marine* (1), on similar words, that there is still an obligation to deliver in the like apparent good order and condition unless the shipowner proves facts bringing him within an exception covering him. Lord Sumner in *Bradley & Sons* v. *Federal Steam Navigation Co.* (2) appears to express the same view.

The second point of law is this. It has been decided by Channell J. in *Compañia Naviera Vasconzada* v. *Churchill & Sim* (3), and affirmed by the Court of Appeal in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (4), that the statement as to "apparent good order and condition" estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them which were apparent to reasonable inspection. Art. III., r. 4, of the Carriage of Goods by Sea Act, 1924, which says the bill shall be prima facie evidence (not prima facie evidence *only*, liable to be contradicted), can hardly have been meant to render the above decisions inapplicable. For the information relates to the shipowner's knowledge; he is to say what is "apparent," that is, visible by reasonable inspection to himself and his servants, and on the faith of that statement other people are to act, and if it is wrong, act to their prejudice.

I am of opinion that r. 4 of Art. III. has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it. Apparent good order and condition

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(1) [1927] 2 K. B. 432, 436, 437.
(2) 27 Ll. L. Rep. 395, 396.
(3) [1906] 1 K. B. 237.
(4) [1924] 1 K. B. 575.

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was defined by Sir R. Phillimore in *The Peter der Grosse* (1) as meaning that "apparently, and so far as met the eye, and externally, they were placed in good order on board this ship." If so, on the *Churchill & Sim* decision (2) the shipowner is not allowed to reduce his liability by proving or suggesting contrary to his statement in the bill that the goods in respect of matters externally reasonably visible were not in good condition when shipped.

Now what was reasonably apparent to the shipowner's servants loading at Shanghai at night but under clusters of electric lights? The ultimate damage was classed by the surveyors as (1.) serious damage where the tins were gashed or punctured, damage easily discernible in handling each tin; (2.) minor damage, pinhole perforations, which on tins covered with rime were not easily discernible but which were found when the tins were closely examined. I have considered the evidence and I find that the first class of damage was apparent to reasonable examination; the second, having regard to business conditions, was not apparent. The result of this is that the shipowner is estopped against certain persons from proving or suggesting that there were gashes or serious damage when the goods were shipped. He may raise the question whether there was not minor or pin-prick damage at that time, but having regard to the small quantity of goods rejected for visible damage I should not estimate the amount of such minor damage at shipment as very high.

The question whether the shipowner is prevented by the statement as to "apparent good order and condition" from relying on the allegation or exception of "insufficiency of packing," one of the exceptions under the Rules in the Schedule to the Act, is more difficult. The shipowners' contention is that there was insufficiency of packing, because (*a*) the eggs were packed in uncovered tins, and, therefore, were difficult to handle when frozen and had less protection than if the tins were covered; (*b*) the tins had sharp edges and corners and were therefore dangerous to each other; and (*c*) that the tins were of too thin plating to stand the wear and tear of contact with other tins. Now the facts that the tins were (1.) uncovered and (2.) with rectangular edges were obvious on shipment. If this was insufficient packing the insufficient packing was obvious. I cannot think that a shipowner who receives, say, a wooden case broken open at one corner or side can describe it as "in apparent good order and condition" and afterwards prove the opposite. And if the insufficiency of the packing is obvious, again I think it cannot be described as in "apparent good order and condition." In truth the rectangular uncovered packages are not "insufficiently packed" but may be dangerous to other cases and are difficult to handle, each matter being obvious to external inspection. Some suggestion is made that the metal containers were too thin, and they were obviously too thin to resist the treatment they received. But it appears from the letter of August 26, 1927, that the metal was of the same thickness as the Union Cold Storage Company's usual tins. I do not see why rectangular tins carefully stowed should damage each other and they are obviously better for the ship in stowage in that they waste less space than round tins, while their lack of covering is apparent.

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(1) (1875) 1 P. D. 414, 420.

(2) [1906] 1 K. B. 237.

I am therefore of opinion that against the proper person the shipowners are estopped by their statement that the cans were shipped in apparent good order and condition from proving that they were insufficiently packed, or in fact seriously gashed, but that they may prove or suggest pinholes on shipment as not being reasonably apparent. The old damage, that is damage done before discharge, found on discharge was variously estimated at 10 per cent. and 40 per cent. and "considerable." The judge finds 50 per cent. On the view I take above this must be reduced by eliminating (1.) any heavy damage done before shipment; (2.) any damage done before discharge due to insufficient packing. If so, and considering the nature of the ultimate damage, I think if the old damage is reduced to 25 per cent., covering pin-prick damage before shipment, and damage due to the ordinary wear and tear on a voyage of parcels properly packed, the shipowner has a larger allowance than he is entitled to.

Whether the consignee is entitled to rely on the statement as to apparent good order depends on whether he relied on the statement without knowledge of its untruth to his prejudice. It was argued that as he ordered square tins and uncovered tins he must have known they were insufficiently packed. He certainly ordered square tins, but had certainly no knowledge of the make of the edges, which were said to be unusually sharp. The statement that he ordered uncovered tins is based on his telegram of May 18 ordering "plain" tins. But this, I think, clearly relates only to absence of mark, as the letter of June 21 contrasting "plain tins" with tins branded "Superegg" shows. In my view the consignee in London had no knowledge of any facts that showed that the tins shipped were not in apparent good order and condition. The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and condition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it.

One comes next to the evidence as to discharge, in which the judge has found ship's negligence. While the evidence as to exact amount is not as satisfactory as it might be, this is due to the ship's officers' or agents' quite improper refusal to sign lightermen's receipts stating the amount of damage or to keep any tallies themselves. They knew the method of discharge was being objected to and that damage was being done and they refused to sign lightermen's receipts. They cannot complain if the estimate of damage is inaccurate or taken only at the wharf. The facts as to the discharge are these. The uncovered frozen tins were slippery to handle or pile. They were discharged by piecework, the men having an obvious motive to do the work quickly. This, so far as it saves the ship demurrage, is to the advantage of the ship, but may lead to the cargo being handled too hastily. It is for this reason that, according to the evidence, the cold stores pay their men by time and not by piecework, finding they get more careful though slower handling. These tins were at first stacked on a wooden tray, with very slight sides. It was found that some tins slid off or fell unpleasantly near the heads of people working below, who not unnaturally protested, and the ship adopted a system of discharging in nets. When the tins were first placed in the net the bottom tier stowed flat. But as soon as the net was hoisted the flat tier disappeared and the tins were pressed together. The chief officer of the ship admitted that there was a chance of damage at that stage. But when the net was lowered into the lighters and set down the chance of damage became almost a certainty. The chief officer describes what happened thus, Question 241: "(Q.) And is it this danger of knocking against the sides that makes you say the trays are better than the nets? (A.) It is to prevent them slipping out. They are slippery and when they let go the side of the net the whole block of tins collapses. When they land the net in the lighter the whole block of tins collapses. The top tier would slip two or three feet." Mr. Silver, who saw the discharge in nets, protested at once; he "saw the tins all jumbled up in the nets." I have considered the evidence and come to the same conclusion as the judge below that this was a negligent method of discharge, for damage done by which the ship is liable. I am satisfied that a very considerable part of the actual damage was caused by this negligence. I do not understand how the judge can have arrived at so small a figure as 10 per cent. of the actual damage being attributable to actual discharge. If, as he finds, 50 per cent. of the actual damage was caused before discharge, and 10 per cent. by negligence in discharge, this leaves 40 per cent. to be caused after discharge. While there is some slight evidence of rough handling at the wharf, on the other hand this work was done by men on time work, with no inducement to hurry, with special wooden trays with high sides. I am quite unable to discover the evidence that would justify the judge in the division of this damage into 10 per cent. ship and 40 per cent. after ship.

Endeavouring to assess the damage on the figures which I have gone carefully into, somewhat as a jury would, I am of opinion that if 25 per cent. of the actual damage is assigned to the period before discharge, 50 per cent. to discharge and 25 per cent. after discharge, the ship is being treated very generously. It may be that the learned judge below has arrived at his figure of 10 per cent. by deducting from the actual damage some percentage as due to insufficient packing. In my view he is not entitled to do this, first, because of the estoppel and, secondly, because in my view a man who discharges cargo negligently is not entitled to say: "If I had discharged the cargo properly there would have been some damage, which I can deduct from the damage caused by my negligence." Further, in my view of the estoppel, the ship cannot claim that some tins were delivered to it gashed and some damaged by insufficient packing. I assess these two classes of damage before discharge at 10 per cent., as compared to 15 per cent. due to non-apparent pin-prick damage before discharge and ordinary wear and tear on voyage. I have stated these figures in order that if any part of my assessment should be dissented from my resultant total may be modified. The percentages I have given are of the total money value. I am conscious that they are rough and ready estimates; but I think if they were arrived at by a jury they could not be upset. As I have said, I think they err on the side of generosity to the shipowners, and I am influenced to some extent by the improper refusal of the shipowners' servants to take or agree tallies of actual damage on discharge protecting them by a reference to "old damage."

In my view therefore the damage for which the shipowner is liable should be roughly assessed at 60 per cent. of the actual damage, and judgment for 2100*l.* with costs should be entered for the plaintiff, the judgment of the learned judge as to amount and costs being set aside.

GREER L.J. The appellant, the plaintiff, in an action against the respondents, brings this appeal against the judgment of Roche J. whereby it was decided that a sum of 350*l.* paid into Court by the defendants was sufficient to satisfy the claim for breach of contract of the carriage of two parcels of cans of frozen eggs from Shanghai to London. By the

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statement of claim the plaintiff claimed to be the owner of a parcel of 16,000 cans and a parcel of 5334 cans of frozen eggs delivered to the defendants' steamship *Æneas* by the Henningsen Produce Company, Ld., for carriage from Shanghai to London and delivery to shippers' order or assigns. The plaintiff made the claim as owner of the said goods and indorsee of the bills of lading to whom the property in the said goods passed by reason of the indorsement of the said bills of lading. He alleged that the goods were delivered in a damaged condition in London, and that the defendants were liable for breach of the contract of carriage which was evidenced by the two bills of lading. Alternatively, he alleged that the damage was caused by the negligence of the defendants.

By their defence, after the formal denials of the plaintiff's allegations, the defendants pleaded that the damage was due to the inherent defects or quality or vice of the said goods, or from the insufficiency of packing thereof, and that by the terms of the bill of lading they were exempted from liability, and while denying liability they brought into Court the sum of 350*l.*

The plaintiff by his reply pleaded that the defendants by the bill of lading having acknowledged the receipt of the said goods in apparent good order and condition on board the steamship *Æneas*, were estopped from denying that the goods were shipped in apparent good order and condition, and by para. 3 of the reply he alleged that the tins containing the frozen eggs were square and had sharp corners, and that they were not covered with fibre and/or hessian cloth and/or cardboard, and therefore that the defendants having accepted the said goods without protest and with full knowledge of the matters aforesaid and having given clean bills of lading in respect of such goods were not entitled to contend that the said matters or any of them constituted acts or omissions of the shipper and/or inherent defect, quality or vice of the said goods and/or insufficiency of packing thereof within the meaning of the exceptions in Art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924.

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When the goods were delivered to the ship at Shanghai it was, of course, apparent to those in charge of the receipt of the goods that the eggs were packed in square tins which necessarily had sharp corners, and that they were uncovered. It was also ascertained that some of them had been damaged before delivery to the ship, and fifty cases were refused on this ground. The goods were carried to London, discharged on to the quay, received by the plaintiff, and put into store, and when finally examined it was found that 2625 tins were badly gashed and in respect of these tins the plaintiff suffered loss to the amount of 1377*l.* 1*s.* 6*d.*, that 8357 tins had small dents and holes in respect of which 1044*l.* 12*s.* 6*d.* was the loss sustained; and there were certain charges incurred for labour, surveyors' fees, and agency, which the plaintiff also claimed.

The learned judge came to the conclusion that some damage was done by the defendants in the course of discharging the cargo by nets, but he did not find any damage occasioned by any act of the defendants at any other time, and he further decided that the amount paid into Court was sufficient to cover the damage occasioned by the method of discharge by nets, which he thought was negligence on the part of the defendants' servants, and he gave the usual judgment in favour of the defendants on the plea of payment into Court.

The bill of lading incorporated the Rules contained in the Carriage of Goods by Sea Act, 1924, and the defendants relied on the exception of insufficiency of packing contained in Art. IV., r. 2, of the Schedule to the said Act. The bill of lading contained the words "shipped in apparent good order and condition," and the first question to be determined is whether the defendants are estopped by these words from alleging that the goods were either in a damaged condition when shipped, or that they were insufficiently packed by reason of the fact that the tins were square and unprotected. It was decided in *Compañia Naviera Vasconzada* v. *Churchill & Sim* (1) that those words in a bill of lading are not contractual, but that they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment. The case was decided in 1905, and I think we ought to accept as good law the proposition that the words are not words of contract but only representations which may give rise to an estoppel. I observe also that the decision in *Churchill & Sim's* case (1) was referred to with approval by Scrutton L.J. in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (2)

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(1) [1906] 1 K. B. 237.

The elements necessary to create an estoppel are three. There must be (1.) a statement of fact, (2.) relied upon by the person alleging estoppel, and (3.) he must have acted on the representations to his detriment. So far as the alleged estoppel is concerned with the shape of the tins and the absence of cover, I am of opinion that the plea of estoppel was not established. I doubt very much whether the statement "shipped in apparent good order and condition" has any reference to original defects of quality or type. The words seem to me to refer rather to acquired damage or defect in the goods rather than to original defects of quality or type. I doubt whether a square tin can be said to be not in good order and condition because it is square and has always been so, or because it is uncovered and has always been so uncovered. I am inclined to think that the words are confined to deterioration or damage which has occurred to the goods of the quality and type delivered. A distinction is drawn by Channell J. in *Compañia Naviera Vasconzada* v. *Churchill & Sim* (1) between quality and condition, and I observe in the definition section of the Sale of Goods Act it was considered necessary to provide specially that the word "quality" in the Act should include "condition." It appears to me that when the goods were received for shipment the shipper and the shipowner were considering that there might be a claim for damage caused during the carriage by sea. In these circumstances the shipowner is willing to say to the shipper: "I admit that up to the present the goods have not been damaged, so far as can be discovered by such examination

(1) [1906] 1 K. B. 237.

(2) [1924] 1 K. B. 575.

as can reasonably be expected." He does not seem to me to be admitting anything as to the fitness of the goods of the kind presented for carriage at sea but only as to their undamaged condition. It is however unnecessary to decide this point, as there are other sufficient reasons for holding that no estoppel was proved so far as the shape of the tins and the absence of covering are concerned.

From Mr. Silver's evidence it is clear that he had ordered square tins and knew that he was going to have square tins shipped to him. I think it is also extremely probable from the letters he wrote that he knew that the tins would come uncovered, but in any case he gave no evidence that he relied on the bill of lading as a statement that the tins were other than square, or that they were covered, and it is remarkable that after he received the bill of lading he never suggested in the letters and telegrams he wrote that he had been led by the bill of lading to believe that he would get tins other than those which in fact came forward, that is to say, uncovered square tins.

As regards the question whether the defendants are estopped from denying that the tins accepted by them on the bills of lading were free from gashes and pin-holes, I think there would be such an estoppel as regards gashes and pin-holes which could have been ascertained by such reasonable examination as can be expected when goods of this kind are delivered for shipment under the conditions necessarily prevailing, that is to say, delivery by night. The plaintiff, Mr. Silver, in his evidence did not say that he relied on the statement that the goods were received free from apparent external damage, and in the absence of any statement that he did rely upon the bill of lading, it is contended that the Court is unable to find his plea of estoppel proved as regards this damage. I think, however, though with some doubt, that the Court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped,

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and that in accepting the bill of lading and taking delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any reasonable examination. On the other hand I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination.

I agree with the learned judge's finding that by reason of their shape combined with the thinness and weakness of the metal, which latter defect was not apparent, the goods were insufficiently packed, and that the insufficiency of packing was one of the causes of the damage complained of. But the exception of insufficient packing which was incorporated in the bill of lading by reference to the Rules contained in the Carriage of Goods by Sea Act, 1924, will not protect the defendants if negligence be proved. Even if the liability of the shipowner be that of a common carrier, and it is proved that the damage is within the exceptions in the contract of carriage, the owner of the goods can still recover notwithstanding the exceptions if he shows that the damage was caused by the negligence of those for whom the shipowner is responsible. The plaintiff failed to prove any negligence in loading or in the carriage to London, but he did prove negligence in the discharge. The plaintiff had to prove not merely negligence; he had to prove the amount of the damage he suffered due to that negligence. It was satisfactorily proved by the plaintiff that the loss he suffered by reason of the damage finally ascertained as existing at the time when the cans were taken into store in London slightly exceeded the amount claimed, which was 3544*l.* There was evidence that a considerable portion of this damage was old damage, and one of the plaintiff's witnesses admitted that the old damage was as much as 40 per cent. For the reasons I have given it seems to me impossible to hold the defendants liable for any of the old damage, except such of it as may be affected by the limited estoppel which I have found as stated in the earlier part of my judgment.

The damage for which I hold that the plaintiff is entitled to be compensated is comprised under two heads: (1.) damage which in fact occurred before the goods were received for shipment under the bill of lading and was of such a character as to be apparent on a reasonable examination. The defendants are precluded by the estoppel from alleging that this damage was not caused while the goods were in their custody. They cannot rely on the exception of insufficiency of packing as the cause of the damage, because the exception only applies to damage arising during the carriage of the goods; (2.) damage occasioned by negligence in the discharge of the cans.

I cannot think that Roche J. was right in his finding that the 350*l.* paid into Court is sufficient to satisfy the damages for which the defendants are liable. I think on the contrary that a very considerable part of the damage ultimately found was due to causes for which the defendants are responsible. The goods were discharged by casual labour paid by the piece. I think it very improbable that any large amount of damage was done after the goods were discharged from the ship, but no doubt some of the ultimate damage ought to be attributed to this stage in the journey from Shanghai to the London stores.

This appeal, like all appeals from judgments given on a trial before a judge alone, is a re-hearing. The judge's findings do not depend on the relative value he attached to the oral evidence of witnesses at the trial. He had to make an estimate based on the general facts of the case and on probability. In my judgment a fair estimate of the damage for which the defendants are liable is 50 per cent. of the total damages, and if the result of this appeal depended on my judgment the appeal would be allowed and judgment entered for the plaintiff for half their claim, that is to say for 1772*l.*, and with costs here and below.

SLESSER L.J. This is an appeal from a judgment of Roche J., whereby he assessed damages against the defendants for 350*l.* in an action for breach of contract resulting in damage to cargo. The plaintiff in the action was the holder of two bills of lading which together covered the goods in question. The defendants are the shipowners. It is not disputed that this cargo arrived at the cold storage depot in a very considerably damaged condition; the damage consisting in gashes, perforations and dents in the tins in which the frozen egg product was contained. This damage was apparently caused by one or more tins coming in contact with their neighbours; nor is there any real dispute that it was the pointed corners of such tins which gashed, pierced or dented the other tins which suffered damage. The evidence in the case largely resolved itself into inquiries at what stage or stages of the journey this damage occurred and, for this purpose, the journey may conveniently be divided into five periods: the first being the period when the goods were on their way from the cold store in Shanghai to the ship, the second the loading into the ship, the third the voyage, the fourth the discharging from the ship into lighters, and the fifth the conveyance by the lighters to the wharf and thence to the cold storage depot in London. It is only for the purpose of loading, carrying and discharging, the second, third and fourth periods, that the shipowners on any view can be made responsible. In substance, the learned judge has come to the conclusion that the damage began during the first period, when the tins were on their way from the cold store at Shanghai to the ship, and continued while they were being loaded on board the ship in Shanghai, and that some damage was done during the discharge from the ship into the lighters, and some when the goods were being dealt with by the lightermen and vanmen at the later stages of their progress. In effect, the only period he excludes from possibility of damage is the voyage itself and, as there is no evidence that during the voyage any damage was done, I also exclude that part of the journey from my consideration.

The 350*l.* which the learned judge has awarded to the plaintiff is arrived at in this way: on arrival in London, after an abortive effort to land the tins on trays or boards, the shipowners resolved to use nets; and the evidence is very

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considerable that, while the tins were in these nets, the tins were "all jumbled up," to use the words of one witness; that they "shot out all over the place when the net opened," in the words of another; and, in the language of a third, "when the net opened the tins spilt all over the show." The learned judge has come to the conclusion that the nets were unsuitable and that they did aggravate the damage; but he has refrained from giving what he believed to be the full damage caused by the nets, because he says that he thinks that some part of the damage due to the nets could not properly be complained of, because some of it was inevitable in any event. In the result, he thinks that 10 per cent. is a fair estimate of the amount of damage due to the nets—the whole of the claim amounting to 3544*l.* odd, of which sum he awarded the plaintiff 350*l.*, the amount paid into Court by the defendants.

It is not at all easy to estimate with any exactitude the degree of damage produced at each stage of the journey; but certain principles may, I think, be applied which have brought me to a conclusion on amount different from that of the learned judge.

In the first place, the bills of lading contained the usual provision that the goods are shipped in apparent good order and condition. It is provided by clause 1 of each bill of lading that the bill is to be subject to the Rules contained in the Schedule to the Carriage of Goods by Sea Act, 1924, and it is pleaded by way of reply in this case, in para. 2, that the defendants having acknowledged the receipt of the said goods in apparent good order and condition on board the *Æneas* are now estopped from denying as against the plaintiff that the said goods when shipped were in apparent good order and condition. The effect of these words has been discussed in several cases; but it is sufficient to refer to the judgment of Channell J. in *Compañia Naviera Vasconzada* v. *Churchill & Sim* (1), approved in *Brandt's* case (2); see also *Martineaus'* case. (3) In *Churchill & Sim's* case (1) the American Harter

(1) [1906] 1 K. B. 237.
(2) [1924] 1 K. B. 575.
(3) 17 Com. Cas. 176.

Act was incorporated in the bill of lading. Here the Rules in the Schedule to the Carriage of Goods by Sea Act, 1924, are incorporated, the wording of which statute does not affect the old principle (per Lord Sumner in *Bradley & Sons* v. *Federal Steam Navigation Co.* (1)), and it was held that by the words "shipped in good order and condition" the shipowners were bound by the representation of the master not as words of contract but by way of estoppel. In this case, however, a complication has arisen by reason of the fact that whereas the gashes may reasonably be said to be apparent, the perforations were not so apparent. In *Churchill & Sim's* case (2) Channell J. says (3): "In my opinion, not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone." In my judgment, the estoppel in this case goes no further than what was apparent to any one, which, I think, includes the gashed tins, but reasonably excludes the less apparent perforations and punctures. It then remains to inquire how much of this damage was sustained after the discharge, when the tins passed out of the control and responsibility of the shipowners. There is evidence of Mr. Towers that at Nelson's Wharf, where the 5000 tins were sent, the tins were pitched into trays and were handled too quickly, and at the National Wharf there was also throwing of tins which must have caused damage. Mr. Bettley also says that he saw some damage done at National Wharf, and Mr. Holmes says that at Nelson's Wharf the tins were not properly handled. Holding, as I do, that the shipowners are estopped from suggesting that any of the gashed tins were injured at the time they were shipped in apparent good order and condition, I am prepared to accept the amount of liability on this head as computed by Scrutton L.J.

There remains for consideration the position of the tins which were not apparently damaged by gashes, as to which the shipowners may properly say that the bill of lading does not estop them. Approaching this as a question of fact without any estoppel, I think that two periods—namely, the loading and the voyage, may be excluded from consideration, as there is no evidence which satisfies me that during either of those periods any injury was sustained. This leaves, however, three periods, the periods before loading, discharge and after discharge, for which the shipowners are only responsible for one—namely, the period of discharge and, again, as I agree with the principles of assessment laid down by my Lord, I adopt his estimate of the shipowners' liability.

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(1) 27 Ll. L. Rep. 396.
(2) [1906] 1 K. B. 237.
(3) [1906] 1 K. B. 244.

The liability of the shipowners is further disputed on a ground with which I have yet to deal. The bills of lading, as I have said, incorporate the Rules in the Schedule to the 1924 Act, and the defendants rely upon Art. IV. thereof which provides, so far as is here material, that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . . (*n*) insufficiency of packing," and it is said here that there was in fact insufficiency of packing for two reasons—namely, first, that the corners of the tins being square and pointed were dangerous unless they had been protected by some covering; and, secondly, that the tin itself was too thin to resist the contact of the points of the other tins. The learned judge has found that the packing was insufficient on the ground that the tins had eight points of excessive and unusual sharpness such as has never been known or seen in the trade before. He does not appear to have accepted the view that they were too thin, as had been contended. Dealing with the question of the pointed tins, I think that such insufficiency of packing must have been apparent to the shipowners. In *Barbour* v. *South Eastern Ry.* (1), in which it was held that the plaintiff sending furniture by train had a duty to pack the furniture; the defendants, the railway company, declined the packing and, as a result, the goods were conveyed unprotected, as the packing of the consignor was insufficient. Cleasby B. there said (2): "the goods were delivered in a manifestly unsafe condition." Now I think there may well be cases where the insufficiency of the packing is not apparent; but in this case, where the insufficiency, if any, was obvious, the shipowners were nevertheless prepared to take the goods without complaint and give a clean bill that the goods were shipped in good order and condition. I think that the capacity of the goods safely to travel was part of their order and condition; and so, being apparent on the face of it, I cannot see how the shipowners can now say that the goods were insufficiently packed.

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(1) (1876) 34 L. T. 67.

(2) 34 L. T. 68.

In *Gould* v. *South Eastern and Chatham Ry. Co.* (1) it is true that it was held that where goods were insufficiently packed, the carrier's knowledge of their condition at the time of their receipt would not necessarily preclude him from setting up as a defence that the damage was due to the insufficient packing. In Story on Bailments the rule as to the obligation of a common carrier, at para. 492 (*a*), is stated not to cover, among other things, the goods "not being properly put up and packed by the owner or shipper"; and Atkin L.J. in *Gould's* case (2) says that "the defendants' knowledge of the improper packing . . . . did not make them responsible." Younger L.J. concurred. But a distinction must be drawn, in my judgment, between a mere knowledge of improper packing and a written statement on which a consignee might reasonably be expected to act that they are in fact in a proper order and condition, such as was given in the present case. In the present case, the defendants accept the goods, not only with a knowledge of their condition, but with a statement that that condition is proper. In my judgment, the clean bill of lading, once the alleged defect in packing is apparent, takes the case out of the ambit of *Gould's* case (1) and other authorities to the like effect. The appellant took the bill and may be assumed to have relied upon it to his detriment in the absence of any evidence to the contrary, and although Mr. Silver may have known that square tins were being shipped to him he was entitled to assume that the shipowners did not regard such square tins as dangerous in that they had said they were shipped in apparent good order. In *The Tromp* (3) it was held that where potatoes were shipped in wet bags described as shipped in apparent good order and condition, the shipowners were estopped from saying that the external condition of the bags was bad. The bill of lading so endorsed affords evidence that externally and so far as meets the eye the goods are shipped in good order and condition: *The Peter der Grosse.* (1)

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(1) [1920] 2 K. B. 186.
(2) [1920] 2 K. B. 193.
(3) [1921] P. 337.

With regard to the allegation that the tins were too thin, the evidence is not sufficient to justify the Court in coming to the conclusion that the tins were insufficiently packed. Indeed, there is some evidence that other consignments had been made with tin of precisely the same thickness; nor does the learned judge appear to rely upon this alleged defect.

In the result, I have come to the conclusion that the defence of insufficient packing is not made out and, therefore, the defendants are responsible for the damage to the tins to the extent and to the amount mentioned by Scrutton L.J.

Appeal allowed.

Solicitors for appellant: *William A. Crump & Son.*
Solicitors for respondents: *Stokes & Stokes.*

(1) 1 P. D. 414.

J. S. H.

WHITE *v.* CUBITT.

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Hackney Carriage—Stage Carriage—Motor Car—Plying for Hire in "public street, road or place"—Private Ground level with Road and unfenced—Metropolitan Public Carriage Act, 1869 (32 *&* 33 *Vict. c.* 115), *s.* 4.

A motor car of which the respondent was the owner and driver plied for hire within the Metropolitan Police district, though not licensed to do so, upon a certain piece of ground. The piece of ground was private property belonging to an adjoining public house but rented to the respondent, it was level with the public street but marked off from it by a line of stone sets not raised above the street level; the public had no leave of access thereto except for the purpose of using the public house or the motor car. The car when standing thereon was in full view of the street:—

Held, that the piece of ground was a "public street, road or place" within the definition of the expression "stage carriage" in s. 4 of the Metropolitan Public Carriage Act, 1869, and, the motor car being in other respects within that definition, that the respondent was liable to the penalties imposed by s. 7 of the Act upon the owner and driver of an unlicensed stage carriage which plies for hire.

Observations in *Birmingham and Midland Motor Omnibus Co.* v. *Thompson* [1918] 2 K. B. 105, 113, 114 applied.

Case stated by justices for the county of Surrey.

On May 1, 1929, Charles E. H. Cubitt (hereinafter called "the respondent") appeared before the justices sitting at Mortlake petty sessions to answer a complaint made by Joseph Albert White (hereinafter called "the appellant"), a police constable, by order and on behalf of the Commissioner of Police of the Metropolis, which charged that the respondent was the owner of an unlicensed metropolitan stage carriage, to wit, a motor car, index mark and number M. C. 7393, found plying for hire within the Metropolitan Police district, at the time and place mentioned below, contrary to the Metropolitan Public Carriage Act, 1869, s. 7. (1) A similar complaint was made by the appellant against the respondent as driver of the motor car, and by consent both the complaints were heard together.

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(1) The Metropolitan Public Carriage Act, 1869, which is entitled: "An Act for amending the Law relating to Hackney and Stage Carriages within the Metropolitan Police district," contains the following provisions:—

Sect. 4: "In this Act 'stage carriage' shall mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein."

The following facts were proved or admitted:—

On February 11, 1929, at 11.15, the respondent with a four-seater motor car, of which he was the owner and driver, was at the side of the Railway Tavern public house at the corner of Upper Richmond Road and Rocks Lane, Barnes. The motor car was standing in full view of the public highway on a private piece of ground, with a concrete surface, belonging to the public house, but rented to the respondent. The concrete surface was level with the road, but was separated from the highway by a line of stone sets, which formed a demarcation, but were not raised above the level of the road. That piece of ground was only used for purposes of the public house, and the public had no access thereto save for the purpose of using the public house or of entering the motor car. The motor car was licensed for revenue purposes as a hackney carriage, but was not licensed by the Commissioner of Police to ply for hire. Two ladies crossed from the road to the concrete surface and entered the motor car. The appellant and another police officer approached the motor car, whereupon the respondent said: "Are you going to the golf course?" The appellant replied, "Yes," and the respondent said, "That will be sixpence each." The appellant and the police officer accompanying him then entered the motor car, and each paid the respondent sixpence, in return for which the respondent handed each of them a ticket from a roll of consecutively numbered tickets with the price 6*d.* printed on each ticket. The respondent then drove the appellant together with the three other occupants of the motor car, from the concrete surface to the Richmond Park

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Sect. 7: "If any unlicensed hackney or stage carriage plies for hire, the owner of such carriage shall be liable to a penalty not exceeding five pounds for every day during which such unlicensed carriage plies. . . . . The driver also shall in every such case be liable to a like penalty unless he proves that he was ignorant of the fact of the carriage being an unlicensed carriage. . . ."

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golf course. The respondent had on several occasions waited with his motor car upon the concrete surface and had conveyed members of the public therefrom to that golf club at a charge of sixpence for each person. The respondent did not exhibit any notice or advertisement to indicate that the motor car was for hire.

For the respondent it was contended: (1.) That the motor car was not plying for hire within the meaning of the Act; and (2.) that, assuming there was a plying for hire, it was not "in a public street, road, or place," in that the concrete surface was private property, and not repairable at the public expense.

For the appellant it was contended: (1.) That the vehicle was plying for hire; and (2.) that although the concrete surface belonged to the public house it was a "public place," in so far as it was not fenced off in any way, and the public could have access to it.

On the facts above stated the justices came to the conclusion that the vehicle was not in any public street, road, or place, and they therefore dismissed the complaints.

The question of law for the Court was whether on these facts the justices were right in dismissing the complaints.

H. D. Roome for the appellant. The justices ought to have convicted the respondent of the offence with which he was charged. The respondent's motor car was not licensed to ply for hire, and therefore, if it was a stage carriage within the meaning of the Metropolitan Public Carriage Act, 1869 (1), the respondent became liable, both as owner and as driver, to the penalty imposed by s. 7 of that Act. The respondent's motor car was a stage carriage within the meaning of that Act. The circumstances of the present case brought the motor car within every part of the definition of "stage carriage," which is contained in s. 4 of the Act. The expression "plies for hire" in that definition was applicable to the motor car at the time and place in question.

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(1) See note (1) ante, p. 443.

[*Moresby* for the respondent. It is not now contended that the motor car did not ply for hire within the meaning of the definition.]

The piece of ground on which the motor car plied for hire was a "public street, road or place" within the meaning of the definition. It was part of a "public street." Apart from authority the circumstances show that, though it was private property, it came within that expression. It was level with the street, it was not separated from the street by any fence or partition, it was freely accessible to the public using the street, and it was so situated that a vehicle standing upon it was in full view of the street and could be entered by persons from the street as easily as if it was on the street. Moreover there is authority for the view that this piece of ground is a street inasmuch as in the case of *Birmingham and Midland Motor Omnibus Co.* v. *Thompson* (1) both Avory and Atkin JJ. expressed the opinion that a piece of ground even less closely connected with the street than this was a part of the street. If this piece of ground was not part of the street, it was clearly a "public place" within the meaning of the definition. That view is supported by the circumstances already mentioned. It is also in accordance with the authorities, a person having been held to have committed an indecent act in a public place who committed the act in an open place out of sight of the highway to which the public were in the habit of going without any right to do so: *Reg.* v. *Wellard* (2); and it having been held that under the Vagrancy Acts the expression public place applied to a railway platform: *Ex parte Davis* (3); a railway carriage in transit: *Langrish* v. *Archer* (4); and a field used as a recreation ground: *Turnbull* v. *Appleton* (5). Even though the place was not a public place within the letter of the Act it should be treated as a public place within the spirit and intention of the Act, because to hold otherwise would be to sanction the mischief which the Act seeks to prevent—namely, the driving of stage carriages by unlicensed and presumably unqualified persons: per Avory J. in *Birmingham and Midland Motor Omnibus Co.* v. *Thompson.* (1)

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(1) [1918] 2 K. B. 105, 113, 114.

(2) (1884) 14 Q. B. D. 63.

(3) (1857) 26 L. J. (M. C.) 178.

(4) (1882) 10 Q. B. D. 44.

(5) (1881) 45 J. P. 469.

Moresby for the respondent. The decision of the justices was right. The respondent's motor car was not at the time in question a "stage carriage" within the Metropolitan Public Carriage Act, 1869, s. 7. (2) It was not at that time within the definition of that expression given for the purposes of the Act in s. 4 thereof, because it did not at that time ply for hire in any "public street road or place" within the meaning of the last-mentioned section. The piece of ground upon which the motor car happened to be at that time was not a "public street" or "public road" within the section. This appears from the circumstances. The piece of ground was private property belonging to the proprietor of the neighbouring public house, it was separated from the road by a line of stone sets, and the public had no access to it except by permission of the owner for the limited purposes of using the public house or entering the motor car. The same view is borne out by the authorities. In *Curtis* v. *Embery* (3) it was held that ground belonging to a railway company and separated from the highway only by a gutter was not a "street" within s. 3 of the Town Police Clauses Act, 1847.

[LORD HEWART C.J. The notion of a thoroughfare runs throughout the whole of the definition of the word "street" given in that section for the purposes of that Act.]

In *Case* v. *Storey* (4) a hackney carriage while on the premises of a railway company by their leave for the use of their passengers was held not to be plying for hire in any public "street" within the meaning of the Hackney Carriage Act, 1831. The statements made by Avory and Atkin JJ. in *Birmingham and Midland Motor Omnibus Co.* v. *Thompson* (1) to the effect that the place there in question was a public "street" were mere obiter dicta which were not necessary for the decision in that case. Neither was this piece of ground a "public place" within the meaning of s. 4 of the Act of 1869. The word "place" in the section must be construed as ejusdem generis with the words "street" and "road" which accompany it in the section: see per Kelly C.B. in *Case* v. *Storey*. (1) All these words are qualified by the adjective "public." The public have no doubt a right to enter the public house during lawful hours, but there is a direct entrance to the public house from the street, and the fact that they are at present permitted to pass over this piece of ground for the purpose of reaching the public house does not therefore make the piece of ground a public place. In *Case* v. *Storey* (1), already referred to, a hackney carriage while on the premises of a railway company for the convenience of their passengers was held not to be plying for hire in a "place" within the meaning of the Hackney Carriage Act, 1831. As s. 7 of the Act is a penal section the expression "stage carriage" there used must be strictly construed. The case of *Reg.* v. *Wellard* (2) and other cases of a similar kind were criminal cases, and in order that a place may be a public place for the purposes of these cases all that is necessary is that it be a place that the public can see.

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(1) [1918] 2 K. B. 105, 111, 114.

(2) See note (1) ante, p. 443.

(3) (1872) L. R. 7 Ex. 369.

(4) (1869) L. R. 4 Ex. 319.

LORD HEWART C.J. This is a case stated by magistrates, and the question which it involves arises out of the hearing of a complaint made by the present appellant on behalf of the Commissioner of the Metropolitan Police against the respondent, the owner of an unlicensed stage carriage being a motor car, which, as the appellant alleged, was found plying for hire within the limits of the metropolitan police district, contrary to s. 7 of the Metropolitan Public Carriage Act, 1869. A similar complaint was made against the respondent as driver, and both complaints were heard together. In the result the justices dismissed the complaint, and the question for this Court is whether in so doing they came to a correct determination in point of law.

The case really turns upon the true interpretation, in relation to the facts, of the definition of the expression "stage

(1) L. R. 4 Ex. 319, 324.

(2) 14 Q. B. D. 63.

carriage" in s. 4 of the Metropolitan Public Carriage Act, 1869. (1) [His Lordship read that section and continued :] It is frankly conceded by Mr. Moresby on behalf of the respondent that upon the facts of the present case all the elements in that definition were to be found except that the place here referred to was not a "public street, road or place." It is not denied that there was here a plying for hire. It is not denied that the locus referred to was a place. But it is said that it was not a public place within the meaning of this particular definition. [His Lordship reviewed the facts stated in the case to have been proved or admitted, observing that the respondent had conveyed or been ready to convey from the piece of ground in question to the golf club any member of the public who desired to go there without reference to any particular class or condition of the public to which he might belong, and continued :] In those circumstances the justices came to the conclusion that the vehicle was not in any public street, road or place, and their conclusion cannot be disturbed if in point of law that was an inference which could properly be drawn from the facts which had been proved.

The attention of the Court has been very properly directed to certain cases which are thought to have some bearing upon the matter here in question. It has not been necessary to refer to the series of cases involving controversies that may be thought to be of a somewhat artificial kind as to the meaning of the expression "plying for hire." But various cases have been cited for the purpose of illustrating the proposition that this particular place was not a public place within the meaning of this Act, though at the same time it is freely admitted that there is no case directly in point. The question is not concluded by authority, and we approach it as if it were a tabula rasa.

It seems to me that much light is thrown upon the matter by the observations of Avory J. in the case of *Birmingham and Midland Motor Omnibus Co.* v. *Thompson.* (2) In that case he used these pregnant words : "I should like to add that if it were necessary to discuss the question whether these omnibuses were under the circumstances plying for hire in a street I should have liked further time to consider it. I am not satisfied that it has been decided in any previous case that under such circumstances as those of the present—namely, the gate of the yard being open, placards and notices directing the public to the yard, and the omnibuses being visible from the street—these omnibuses might not properly be said to be plying for hire in a street, but it is not necessary to decide that, and I postpone the expression of any opinion upon it." (1) In the same case Atkin J., now Lord Atkin, said: "There is one matter that I should like to refer to, though I express no opinion upon it namely, whether, if this case had to be sent back for decision upon the question, it would not have been open to the magistrates to find that the appellants here were permitting their omnibus to be used for plying for hire in a street. In this case the magistrates have found the contrary. I only desire to say that in another case it appears to me that upon similar facts it might be possible for the magistrates to come to a different conclusion." (2)

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(1) See note (1) ante, p. 443. (2) [1918] 2 K. B. 105.

It seems to me that those observations made with reference to the circumstances of that case are applicable a fortiori to the circumstances of the present case. Here the whole scheme and purpose of the arrangements which have, not without ingenuity, been made, were to enable this motor vehicle to ply for hire by attracting the public through being manifestly exhibited near the edge of the highway at a place to which the public were invited, to which the public had resort, and around which there was no sort of barrier, physical or other, to prevent the ingress and egress of the public.

In my opinion this place was as public as it could be, and was selected for the purpose of the respondent precisely because it was as public as it could be. Upon the materials, I think, there was no evidence to justify the justices in coming to the conclusion that for the purposes of this section, and with reference to the mischief against which this section is directed, this was not a public place.

(1) [1918] 2 K. B. 113.

(2) [1918] 2 K. B. 114.

I think, therefore, that the case ought to go back to the justices with a direction to convict.

SWIFT J. I agree.

BRANSON J. I agree.

Appeal allowed.
Case remitted.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Pierron & Morley.*

J. R.

1929
Dec. 3.

GULF AND SOUTHERN STEAMSHIP COMPANY (INCORPORATED) *v.* BRITISH TRADERS INSURANCE COMPANY, LIMITED.

[1929. G. 2114.]

Insurance (Marine)—Insurance by Shipowners upon any "Charges" of Assured upon Cargo—Loss of Vessel—Claim by Shipowners to recover from Under-writers for Loss of Freight.

By a policy of insurance the defendant insurance company insured the plaintiffs, who were shipowners, in respect of one of their steamships "on cargo as per form attached." The form attached provided that the insurance was (inter alia) "upon any charges of said assured upon said cargo or any portion thereof." The policy further provided that the term "cargo" as used in the policy included (inter alia) "charges of said assured upon said cargo or any portion thereof." During the currency of the policy the plaintiffs' steamship became a total loss with all her cargo, and the plaintiffs lost their right to recover from the different consignees the freight which was in process of being earned by them at the time of the casualty. The plaintiffs claimed to recover under the policy from the defendant insurance company in respect of that loss:—

Held, that the words "any charges of said assured upon said cargo" included, and were intended to cover, the freight that was in process of being earned by the ship, and that therefore the plaintiffs were entitled to recover under the policy in respect of that loss.

ACTION tried before Roche J. in the Commercial List.

The plaintiffs claimed under a policy of marine insurance in respect of losses.

An order was made that pleadings should be dispensed with, and that the action should be tried upon an agreed statement of facts, which was as follows :—

1. The plaintiffs, the Gulf and Southern Steamship Company (Incorporated), were a subsidiary company of the Eastern Steamship Lines (Incorporated). They were at all material times the owners of the steamship *Louisiana*, and ran that steamer and other steamers for the purposes of lines maintained by them between (inter alia) New Orleans and Key West and Miami. They were entitled to the benefit of and to sue on the policy hereinafter mentioned.

2. By a policy of insurance dated November 2, 1926, a copy of which was attached to the statement of facts and which was admitted to be valid, the defendants, the British Traders Insurance Company, Ld., insured the plaintiffs in respect of (inter alia) the said steamer as therein mentioned.

The policy was described as an insurance for $7965 part of a total similar insurance of $150,000 from noon on August 15, 1926, to noon on July 1, 1927, " on cargo (1st interest) as per form attached including and subject to the clauses and conditions of the form attached." The form attached provided that the insurance was " on cargo of any kind owned by the assured and on the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and/or on cars on docks, piers, wharves, lighters and/or craft, transfers, and all land conveyances, and also to cover upon any advances made by and payment of back charges made by or due from said assured, and upon any charges of said assured upon said cargo or any portion thereof, including risk of transhipment."

" It is agreed that the term ' cargo ' as used in this policy includes goods, wares, merchandise . . . . and where used in this form it includes also all advances made by and payment of back charges made by or due from said assured, and/or charges of said assured upon said cargo or any portion thereof."

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"It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance on such cargo as may be carried under 'insured' rates of freight against perils of the seas and fire, jettisons, barratry and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof; and the said assurers agree and undertake to indemnify and hold harmless the said assured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the assured may be held by the owners thereof under any liability the assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in general average, and/or for salvage, landing, warehousing and/or special charges, and to cover in like manner any cargo owned by the assured, and also all advances made by and payment of back charges made by or due from said assured and/or charges of said assured upon said cargo or any portion thereof."

3. The following facts as to the plaintiffs' course of business were at all material times well known to the defendants:—

(i.) Goods carried by the plaintiffs were frequently carried with all charges "collect," i.e., payable by the consignee at their ultimate destination. In such cases, in the event of loss, no charges were payable by the consignee.

(ii.) The plaintiffs might either carry the goods over the whole of their transit, or they might be one of a succession of carriers, the first of whom issued a through bill of lading to the consignor covering the whole of the transit. In such cases, the freight or other charges of each carrier of goods being carried with charges "collect" were considered as earned on the safe termination of such portion of the whole transit as that carrier might be responsible for, and were paid by the carrier next in the series who added them to his own charges and collected them from the next carrier or the consignee as the case might be. Such charges so paid to previous carriers were known and referred to in the policy as "back charges." They were at the risk of any carrier who had paid them in so far as, if the goods were lost while in the charge of such carrier, he could not recover them either from the previous carriers or from the carrier who would have taken on the goods from him or from the consignor or consignee.

(iii.) The plaintiff on being paid at an appropriate rate frequently took upon themselves in respect of goods carried by them the full liability of a common carrier and/or of an insurer against divers maritime perils, (inter alia) perils of the sea. Goods carried on the terms that the plaintiffs should thus take upon themselves the insurance of the goods were said to be carried under "insured" rates of freight.

4. On October 27, 1926, the steamship *Louisiana* left New Orleans for Miami and Key West with a general cargo. On the next day she was sunk in a collision and became a total loss with all her cargo. It was admitted that this loss gave rise to claim on the policy, the question for the Court being what classes of loss were covered by the policy.

5. The loss of the said steamer and her cargo produced (inter alia) the following classes of loss to the plaintiffs :—

(i.) They became liable to pay to the owners of goods accepted at "insured" rates of freight on board the said steamer divers sums.

(ii.) They lost their right to recover from the consignees of certain of the goods certain "back charges" paid by them, amounting to $2974.22.

(iii.) They also lost their right to recover from the different consignees the freight which was in process of being earned by them at the time of the particular casualty and which only became payable, together with the

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said back charges, on right and true delivery by the plaintiffs of the goods in question at their destination. The freight so lost amounted to $7366.33.

6. No question arose in respect of the classes (i.) and (ii.) mentioned in the preceding paragraph, the defendants' having admitted liability in respect thereof.

The question for the opinion of the Court was whether the loss mentioned under (iii.) of the said paragraph was covered by the policy or not. If the Court should be of opinion that they were so covered, the defendants' proportion amounted to 113*l.* 4*s.* 7*d.*

PARTICULARS.

1. Balance admitted due by defendants under 5 (ii.) hereof. $157.24 at $4.85 to the £ sterling	£32	8	9
2. Defendants' proportion under 5 (iii.) hereof. $391.84 at $4.85 to the £ sterling . .	£80	15	10
	£113	4	7

J. Dickinson for the plaintiffs. The plaintiffs are entitled to recover from the defendants under the words "charges of said assured upon said cargo" in the policy the freight which would have been payable to them as the remuneration for their own carriage of the goods. Lord Esher M.R. in *The Bedouin* (1) said that "freight is the charge made by the shipowner for the carriage of goods on board his ship." The expression would be meaningless if it does not mean the assured's charges for freight, because this freight would be the only charge which the assured would be likely to have.

David Davies for the defendants. The plaintiffs are not entitled to recover their freight under the expression, "charges of said assured upon said cargo." The freight is only payable upon delivery of the cargo. At the time of the loss there was nothing due to the plaintiffs in respect of the carriage of the goods. The word "charges" is incapable of meaning unearned freight. Freight must be insured eo nomine in the policy: see Arnould on Marine Insurance, 11th ed., s. 233. Effect can be given to the word "charges" without giving it the meaning sought to be placed upon it by the plaintiffs. Sometimes special charges are made for something done at the time of loading and which it therefore earned prior to the loss, or the plaintiffs might have charges for which they required to be protected by insurance after the time the freight had been earned.

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(1) [1894] P. 1, 12.

J. Dickinson replied.

ROCHE J. This case raises a short, neat and interesting point on the construction of a policy of marine insurance.

The parties have very wisely agreed to try it upon an agreed statement of facts, which is clear and to the point, and leaves the matter, having explained the terms which are used in the insurance documents, as one of construction, but the explanations contained in the statement of facts were necessary having regard to the nature of the trade in which the assured were engaged.

The matter may be compendiously summarized in the following way. The plaintiffs were shipowners engaged in one part of a venture which is often conducted by through bills of lading, and the policy which was effected may be stated to be one which was intended to cover their concern with the goods which they were carrying in the part of the transit with which they were concerned. They might be concerned in the whole of the transit, or only with part of a larger transit. The policy is described as an insurance for "7965 dollars part of 150,000 dollars" on "cargo (1st interest) as per form attached including and subject to the clauses and conditions of the form attached." Therefore one is referred to the attached form to see what it was that was covered.

The real question in this case is whether, when one has read that form, the Court is satisfied that the assured's freight, which was or might be at risk, was covered. The most material words in the form are as follows: "On cargo of any kind owned by the assured," that is the first point, and it is to be noticed that primarily the assured are not cargo owners, but if they do own cargo on board the ship then that is covered. But there are three other classes which are covered, and no one of those classes consists of the actual ownership of cargo. That is dealt with under number 1. In respect of the matters mentioned in the other three parts of this clause the assured are not cargo owners. The next thing is: "On the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and/or on cars on docks, piers, wharves, lighters and/or craft, transfers, and all land conveyances." The next thing, therefore, is liability. Then the third thing is: "also to cover upon"—I do not know why "cover upon." The word "upon" might have been omitted—"any advances made by and payment of back charges made by or due from said assured." What that means is explained in the statement of facts. (1) That is to cover anything which the assured may have paid other parties concerned in this transit when they took over the goods, but which they could only recover upon completion of the voyage by delivery of the goods. That is the third thing, what they have paid other people but which they have at risk because it could only be earned by them on completion of the voyage. The fourth thing is the one which gives rise to the controversy in this case: "And upon any charges of said assured upon said cargo or any portion thereof, including risk of transhipment." Now the next paragraph contains very much the same provisions as to certain matters that I have dealt with under numbers 3 and 4, as are contained in the paragraph which I have just read. Then there is a further clause to the effect that the term "cargo" in this form includes all advances made by and payment of back charges made by or due from the assured and/or charges of said assured upon said cargo or any portion thereof.

I read that stipulation as meaning this, whereas the policy is described as one on cargo, yet it is agreed that it is something much more. The question is: Does that something more include freight? In my opinion it does. It is true that Arnould on Marine Insurance says at para. 233 of the 11th edition that freight must be insured eo nomine in the policy. Mr. David Davies quite wisely has not contended that that means that you can never insure freight unless you use the word "freight." Any apt wording indicating that freight is the thing covered, or one of the things covered, is sufficient to give the protection of the policy to freight.

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(1) Ante p. 454.

Therefore the question is, is the term "charges" or "any charges" used in this document sufficient to cover and include freight? In my opinion it is. Lord Esher M.R. in the course of his judgment in *The Bedouin* (1) says this: "Freight is the charge made by the shipowner for the carriage of goods on board his ship." The parties to these proceedings have, in stating the facts, used words—though they do not apply to freight itself—in much the same sense as they were used by Lord Esher. They say this: "Goods carried by the plaintiffs are frequently carried with all charges 'collect,' i.e., payable by the consignee at their ultimate destination." I take that to mean that the word "collect" is used as meaning collectable or that all charges are to be collected, meaning to be collected and payable at their ultimate destination. There can be no doubt, I think, that in that connection and association the word "charges" must be intended to include freight. It is said that to make this plain, so as to support the plaintiffs' contention, the words should have been "freight or other charges," phraseology which, no doubt, is often employed in documents relating to ships, but the very wording of that phrase "freight or other charges" means and imports that freight is a charge. It is a charge, and in my judgment it falls within the sweeping and comprehensive phraseology of "any charges" employed in this form which I am considering.

It is not a matter which admits of any detailed argument or any very extensive judgment, but I may perhaps usefully refer to the next paragraph in the form which mentions a

(1) [1894] P. 1, 12.

number of things which are covered by the policy. One of them is: "also the insurance on such cargo as may be carried under 'insured' rates of freight." What "insured rates of freight" are is also explained by the statement of facts; they are rates of freight which include both insurance and carriage. I do not gather, and it is not stated, that there is any apportionment between what is charged for insurance and what is charged for carriage, and I read that stipulation to mean that insured rates of freight are covered notwithstanding that part of the rates of freight is really charged for as a premium of insurance. I think the only reason why the freight is not specifically provided for is because that is the first and most natural thing which the parties would think of as being a charge upon or in respect of the cargo.

Mr. David Davies makes the point that the phrase is not "charges in respect of the cargo," but "charges upon the cargo." I think myself that distinction is too fine and is an unreal one in a consideration of this document, but even if the word "upon" is to be pressed I think it would not be correct to say that freight is not a charge upon the cargo because the freight itself is not earned at the time of the loss. The truth is that the back charges also are only earned or recoverable when the voyage is accomplished, but the insurance is one directed to reimburse the assured against the contingency of the voyage not being accomplished. I think in using the words, "charges upon the cargo," the parties have, for the reasons I have already assigned, made it sufficiently plain that they intended to cover that which is the principal charge upon or in respect of the cargo—namely, the freight that is in process of being earned by the ship.

For these reasons I give judgment for the plaintiffs for the sum claimed—namely, 113*l.* 4*s.* 7*d.*, with the costs of the action.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Parker, Garrett & Co.*

R. F. S.

1929
April 9.

MUMBY *v.* VOLP.

Public Health—Factory—Tenement Factory—Mechanical Power—Two Factories in the Building—Fire Escape—Failure to maintain—Owner's Liability—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 14, *sub-ss.* 1, 6, *and* 7; *s.* 149, *sub-s.* 1.

By the Factory and Workshop Act, 1901, s. 149, sub-s. 1: "The expression 'tenement factory' means a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories: . . . .":—

Held, that the meaning of "tenement factory" is not confined in the above definition to factories where the mechanical power is supplied by the owner of the building, but extends to cases where the power is supplied by a third person, provided the supply to the different parts is from one and the same source; and that the "owner" may be liable accordingly.

Dicta of Buckley J. in *Toller* v. *Spiers & Pond, Ld.* [1903] 1 Ch. 362 and of Lord Alverstone C.J. in *Brass* v. *London County Council* [1904] 2 K. B. 336 discussed and explained.

Case stated by Manchester stipendiary magistrate.

An information was preferred by the respondent, an inspector under the Factory and Workshop Act, 1901, against the appellant for that on July 2, 1928, being the owner of a factory at Ancoats he did unlawfully fail to maintain the means of escape by fire in good condition and free from destruction, contrary to the Factory and Workshop Act, 1901, s. 14.

On the hearing of the information the following facts were admitted or proved:—

The premises in question consisted of four floors and a basement. The basement, ground floor, and first floor were occupied by the appellant, who carried on business there as a shirt manufacturer. The other floors (except the second) were let by the appellant to one Cowgill, who carried on business there as a blouse manufacturer, employing more than forty persons.

The appellant's factory and that of Cowgill were worked by separate and distinct electric motors, driven by electricity generated and supplied by the electricity undertaking of the

Corporation of Manchester, without which the electric motors could not have been driven.

On July 2, 1928, the means of escape in case of fire provided in Cowgill's factory was not maintained in good condition and free from obstruction.

The appellant contended that the premises were not a tenement factory, since the appellant and Cowgill supplied their own mechanical power by separate electric motors: that the electricity supplied by the Corporation was not mechanical power within the Factory and Workshop Act, 1901, s. 149, sub-s. 1; and that Cowgill as occupier and not the appellant as owner was liable under the Act. The respondent contended that the electricity supplied was mechanical power supplied to different parts of the same building, so as to constitute the premises a tenement factory under s. 149, sub-s. 1, of the Act. The magistrate convicted the appellant, but stated this case for the opinion of the Court.

P. Butlin for the appellant.

H. Rhodes for the respondent.

[The arguments of counsel appear sufficiently from the judgments delivered by the Court.]

LORD HEWART C.J. This is a case stated by the learned stipendiary magistrate for the city of Manchester. An information was preferred by the respondent, an inspector under the Factory and Workshop Act, 1901, against the appellant, under s. 14 of that statute, for that as owner of a certain factory in Ancoats he unlawfully failed to maintain in good condition and free from obstruction a means of escape in case of fire. The learned magistrate, having heard the evidence and considered his decision, convicted the appellant of the offence and fined him. The question for this Court is whether the learned magistrate in so deciding came to a correct determination in point of law.

So far as the facts are concerned, they fall within a narrow compass. It is found as a fact that the appellant at all material times carried on business at Sunbeam House, in Blossom Street, Ancoats, and that those premises, of which he and another person were owners, consisted of four floors and a basement. The basement, the ground floor, and the first floor were occupied by the appellant himself; the second floor was not occupied at all; the other floors were let off by the appellant to other persons. More than forty persons were employed in the premises, regarded as a whole, and at the time referred to in the information the third and the fourth floors of those premises were occupied by a certain tenant of the appellant, and that tenant carried on upon those premises a manufacture in which he employed more than forty persons. So far as the question of power is concerned, the findings in the case are these: That the factory of the appellant himself and the factory of his tenant were at all material times respectively worked by electric motors and that the electric motors in the factory of the appellant himself were separate and distinct from the electric motors in the factory of his tenant; that the electric motors were driven by electricity generated and supplied by the electricity undertaking of the Corporation of Manchester; that each of the factories had its separate meter; and that without that supply of electricity the electric motors could not be driven.

In that state of the evidence, as to which there is no dispute, it was contended on behalf of the appellant that these premises were not, upon the true construction of the statute, a tenement factory, because the appellant and his tenant respectively supplied their own mechanical power by means of their own separate electrical motors, and the electricity supplied by the Manchester Corporation was not mechanical power within the meaning of the Act. It is not in terms stated in the case that there is a contention on the part of the appellant that the word "supplied" in the Act must mean "supplied by the owner," but as supporting the argument which is stated in the case that argument has been urged before us by Mr. Butlin on behalf of the appellant.

[His Lordship read the definition of "tenement factory" in the Factory and Workshop Act, 1901, s. 149, sub-s. 1 (supra), and continued :] Now it was not suggested here that the different parts of these premises did not, in law, constitute a separate factory; but it was said in substance that here there was no supply of mechanical power within the meaning of this definition, and that even if there was, that supply was a supply not made by the owner himself.

Our attention has been directed to two cases: first to *Toller* v. *Spiers & Pond, Ld.* (1), where Buckley J., as he then was, said with reference to the premises there in question: "But is this a factory where mechanical power is 'supplied to different parts of the same building occupied by different persons'? I think plainly it is not. Those words obviously do not mean simply a factory where mechanical power is used. That is already involved in the word 'factory.' They point, not to the user, but to the 'supply' of mechanical power to different parts of the same building—a supply, for instance, by the occupier of the one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including and perhaps meaning the person of whom the tenement is held." Much stress has been laid, and very naturally laid, on behalf of the appellant, upon those words "including and perhaps meaning the person of whom the tenement is held." But it is quite clear not only from the form of expression which the learned judge there employed, but also from the nature of the question which was there involved, that he was not at all purporting to decide that in this section the words "supplied to" mean, and must mean, "supplied by the owner to." No such question arose in *Toller* v. *Spiers & Pond, Ld.* (2), because each of the factories therein referred to produced its own motive power. Undoubtedly one has to bear in mind the contrast in this passage between mere "user" of the thing, which is sufficiently indicated by the use of the word "factory," and "supply," which suggests something of an external nature. Speaking for myself, I cannot think it is right to read into this definition the words "by the owner." No doubt when this definition section is considered in conjunction with other sections which specify the duties that fall upon owners of tenement factories, it is apparent that the legislature for some reason is making the owner liable for acts or omissions, it may be, of other persons acting alone. If the legislature had meant that one of the conditions to be fulfilled before that responsibility arose was that the mechanical power must be supplied *by the owner* to the different parts of the same building, it would have been very easy to say so. It does not appear to me to be right to read into this definition section after the word "supplied" the words "by the owner." Our attention was also directed to the case of *Brass* v. *London County Council* (1), where Lord Alverstone C.J. dwelt upon the contrast already referred to. "But in my view," he said, "the facts here do not bring these buildings within the earlier part of the definition: mechanical power was not 'supplied to different parts' of the building. I understand that expression 'supplied to' to mean supplied from one and the same source; but here Mr. Brass's two tenants had each their own separate supply. Had the Legislature meant nothing more than a factory where mechanical power is used in different parts of the same building occupied by different persons, it would have been more natural for them to have said so." Accepting therefore as I do the view that "supply" in this section means supply from one and the same source, though not necessarily by the owner himself, one has to consider whether the conclusion of the learned magistrate upon the facts of this case was correct.

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(1) [1903] 1 Ch. 362, 368.

(2) [1903] 1 Ch. 362.

The only difficulty which remains is the difficulty derived from this expression "mechanical power." It was urged that, upon a true view of the facts here, it is incorrect to say that mechanical power was supplied to different parts of the same building from one and the same source. That argument may be expressed simply in this way: Electrical energy is not mechanical power. It is true that electrical current came from the same mains of the same corporation, and, if the question were only one of electrical current, the source of supply was no doubt identical for the whole of the building; but before that electrical energy was transmitted into mechanical power something further had to be done, that is to say, electric motors had to be employed. Here the electric motors of the tenant and the owner were quite separate from each other, as also were the meters which registered the amount of electrical energy that they respectively consumed. That argument in such a case as this does not commend itself to my mind. The facts show that the power on the various floors of these premises was derived from one and the same source—namely, the mains of the Manchester Corporation—and it matters not that the individual motors and the individual meters were separate and distinct. There was evidence here upon which the magistrate was entitled to draw the conclusion that there was a supply of mechanical power to different parts of this building, those words "supplied to" being interpreted, as in the case just mentioned, as meaning supplied from one and the same source. In those circumstances the true conclusion is, I think, that the magistrate came to a correct determination, and this appeal ought to be dismissed.

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(1) [1904] 2 K. B. 336, 340.

AVORY J. I am of the same opinion. The alleged offence in this case being the failure to maintain in good condition and free from obstruction a means of escape in case of fire, the effect of s. 14 of the Factory and Workshop Act, 1901, is to make the owner responsible instead of the occupier, if the building in question is a tenement factory. Two difficulties have been suggested. First, that the building, in the circumstances, is not a tenement factory, and, secondly, that the electricity supplied by the electricity undertaking of the Corporation of Manchester is not mechanical power within the meaning of s. 149 of the Act. Upon the second point I think it is clear on the definition of a textile factory, in s. 149, as being "any premises, wherein steam, water or other mechanical power is used to move or work any machinery," that electricity supplied

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by the electricity undertaking of the corporation in this case is mechanical power ejusdem generis with steam and water.

The remaining question, therefore, is whether this is a factory where mechanical power is supplied to different parts of the same building, occupied by different persons, for the purpose of a manufacturing process in such manner that those parts constitute in law separate factories; and unless we are prepared to hold that those words mean "supplied by the owner of the building," it seems to be clear that in this case the mechanical power was supplied to different parts of the same building occupied by different persons. I agree with my Lord that the judgment of Buckley J. (as he then was), in *Toller* v. *Spiers & Pond, Ld.* (1), cannot be taken as meaning that "supplied" for the purpose of that section means "supplied by the owner of the building." He said in his judgment: "They point, not to the user, but to the 'supply' of mechanical power to different parts of the same building —a supply, for instance, by the occupier of the one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including and perhaps meaning the person of whom the tenement is held." In my view, these words were not intended to be exclusive in the sense that the statute means that the supply must be by the owner. I think the learned judge meant by those words that it would include the case of the person from whom the tenement was held. I do not think he ever intended to say by the words "perhaps meaning" that that was the only and exclusive meaning of those words. The same observation applies to the judgment of Lord Alverstone C.J. in *Brass* v. *London County Council* (2), where he says that the legislature in s. 149 probably had in mind "the case, which is very common in the North of England, of a number of small factories occupying different floors in a large building, each floor being supplied with motive power from a central source, generally belonging to the owner of the premises." There again those words clearly are not intended to exclude any other source of supply than that which is given by the owner. For these reasons I agree that the appeal in this case must be dismissed.

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(1) [1903] 1 Ch. 362, 368.

(2) [1904] 2 K. B. 336, 340.

SWIFT J. I agree.

Appeal dismissed.

Solicitors for the appellant: *Gregory Rowcliffe & Co., for J. Odgen Hardicker & Hanson, Manchester.*

Solicitors for the respondent: *Sharpe, Pritchard & Co., for the Town Clerk, Manchester.*

F. P. F.

TOLLEY *v.* J. S. FRY AND SONS, LIMITED.

[1928. T. 1188.]

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Defamation—Libel—Caricature of amateur Golfer used as Advertisement of Goods—Whether reasonably capable of defamatory Meaning.

The defendants, a firm of chocolate manufacturers, issued, as an advertisement of their goods, a caricature of the plaintiff, a prominent amateur golfer, depicting him as playing golf, with a packet of their chocolate protruding from his pocket, and a caddy was represented with him, who also had a packet of chocolate, the excellence of which he likened to the excellence of the plaintiff's drive. The advertisement was published without the knowledge or consent of the plaintiff, who thereupon brought an action claiming damages, alleging that it constituted a libel. By his statement of claim he alleged that "the defendants thereby meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer."

At the trial the plaintiff stated that the advertisement cast an imputation on his amateur status and might prevent his playing for the amateur championship. Evidence was also given by golfers to the effect that if an amateur golfer lent himself to a scheme for advertising, people might think he was not maintaining his amateur status and that he might be called upon to resign his membership of any reputable club. It appeared from correspondence passing between the defendants and their advertising agents that the question of the possible effect on the amateur status of the plaintiff and others similarly caricatured had been brought to the attention of the defendants.

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Acton J. ruled that the advertisement was capable of a defamatory meaning and left the case to the jury, who found for the plaintiff, assessing the damages at 1000*l.* The defendants appealed:—

Held (Scrutton L.J. dissenting), that there was no evidence of any special facts known to those to whom the advertisement was published causing them to attach to it the meaning alleged in the innuendo; that in the absence of such evidence the advertisement was not capable of a defamatory meaning; and that judgment should be entered for the defendants.

Held, also, by the whole Court that the damages were excessive.

Appeal from verdict and judgment at trial before Acton J. and a common jury.

The plaintiff sued the defendants to recover damages for libel contained in an advertisement of the defendants' chocolate which appeared in two daily newspapers. The advertisement in question included a caricature of the plaintiff depicted as playing golf with a packet of the defendants' chocolate protruding from his pocket, and beneath the picture were the following words:—

"The caddy to Tolley said, 'Oh, Sir!
Good shot, sir, that ball see it go, Sir!
My word, how it flies,
Like a cartet of Fry's,
They're handy, they're good and priced low, Sir!'"

Para. 4 of the statement of claim was as follows: "The defendants thereby meant, and were understood to mean, that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate; that he had done so for gain and reward; that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety and gain by the means aforesaid; and that he had been guilty of conduct unworthy of his status as an amateur golfer." The plaintiff said that he had thereby been held up to ridicule and contempt, and had been injured in his credit and reputation.

The defendants admitted the publication of the advertisement, but denied that thereby or at all they meant or were understood to mean what was alleged in para. 4 of the statement of claim. The advertisement, they said, was incapable of the alleged or of any other defamatory meaning, and that without the said alleged meaning it was no libel.

At the trial the plaintiff gave evidence that he was a stockbroker; that he was amateur golf champion of England in 1920 and in 1928; that he had no idea that the advertisement in question was being prepared, or was about to be published; that he did not eat the defendants' chocolate either while playing or otherwise; that he considered that the imputation on his amateur status would have an injurious effect, and might prevent his playing for the amateur championship.

Two witnesses were called in support of the plaintiff's case. One of these, a golfer who had represented England in international contests, said that if an amateur golfer lent himself to a scheme for advertising a great many people would think he was not maintaining his amateur status, and that it would damage his reputation as an amateur golfer. He said he was greatly surprised to see the plaintiff's name in the advertisement. The second witness, the secretary of a golf club, said that if an amateur lent himself as a golfer to the advertisement of people's goods he would probably be called upon to resign his membership of any reputable club.

Correspondence between the defendants and their advertising agents was put in, from which it appeared that the defendants had made the suggestion that Miss Helen Wills and Miss Betty Nuthall, two distinguished lawn tennis amateurs, should appear in the series of caricatures instead of Mademoiselle Suzanne Lenglen, who was then a professional. To that suggestion the advertising agents replied as follows: " . . . . You returned the Suzanne layout with the suggestion that we should feature either Helen Wills or Betty Nuthall instead. We feel that there are several things which make this undesirable. Firstly, both Betty Nuthall and Helen Wills are amateurs, and in tennis circles, even more than in golf circles, the amateur status must be carefully guarded, hence if Cyril Tolley has any quarrel with us, it is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes."

The defendants, who called no evidence, submitted that the publication was not reasonably capable of bearing the alleged or any defamatory meaning.

Acton J. ruled against this contention, and left the case to the jury, who found a verdict for the plaintiff, assessing the damages at 1000*l*. Judgment was thereupon entered for the plaintiff for that amount.

The defendants appealed.

Birkett K.C. and *W. T. Monckton* for the appellants. The judge was wrong in leaving the case to the jury. Ex facie the publication complained of is harmless and is not capable of a defamatory meaning. In *Capital and Counties Bank* v. *Henty* (1), Lord Selborne, L.C. said (2): "I do not understand any of the learned judges in the Courts below to have been of opinion (nor do I think it is the opinion of any of your Lordships) that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (i.e., in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law." Again, Lord Selborne said (3): "The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense." Lord Blackburn in the same case said (4): "The question, therefore, seems to me whether, by showing such a publication the plaintiffs have so far satisfied the onus which is on them, that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation." See also *Mulligan* v. *Cole* (5); and *Nevill* v. *Fine Art and General Insurance Co.* (6), which are to the same effect. In this case three matters have to be postulated before the publication can be made actionable; first, that every one appearing in a caricature of this kind has consented to the publication; secondly, that every one so appearing has received payment from the advertisers; and thirdly, that every one so appearing is desirous of obtaining notoriety. But no evidence was given that any one looking at the publication would understand it as conveying such a libellous meaning; and in the absence of such evidence the action is not maintainable.

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(1) (1882) 7 App. Cas. 741.

(2) Ibid. 744.

(3) Ibid. 745.

(4) 7 App. Cas. 785.

(5) (1875) L. R. 10 Q. B. 549.

(6) [1897] A. C. 68.

[They also cited Gatley's Law of Libel and Slander, 2nd ed., p. 669.]

In any event, the damages were excessive, and the jury's verdict should not be allowed to stand.

[They referred to *Greenlands, Ld.* v. *Wilmshurst.* (1)]

Rayner Goddard K.C. and *Giveen* for the respondent. A picture differs from written words in that it produces an instantaneous impression upon persons who see it. The question is whether the caricature complained of would represent to the public that the respondent assented to the publication and had received money for allowing it. It is submitted that it was capable of such an interpretation. Reasonable people would think that the respondent would not allow the caricature to appear unless he received some consideration for it, thus imperilling his amateur status. This view is clearly supported by the correspondence passing between the appellants and their advertising agents. The letters show that the advertising agents had in view the likelihood of a defamatory meaning being attributed to the caricature—namely, that the respondent was a party to the advertising scheme. *Capital and Counties Bank* v. *Henty* (2) is not against the view we put forward.

On the question of damages, it is submitted that the amount awarded was not in the circumstances excessive. In such a case the jury is entitled to take into consideration the whole of the appellants' conduct in connection with the publication of the caricature: *Praed* v. *Graham.* (3)

(1) [1913] 3 K. B. 507.
(2) 7 App. Cas. 741.
(3) (1889) 24 Q. B. D. 53.

Birkett K.C. in reply cited *Dockrell* v. *Dougall* (1); *Corelli* v. *Wall* (2); *Monckton* v. *Dunn & Co.* (3); and *Wood* v. *Sandow.* (4)

Cur. adv. vult.

Nov. 25. The following judgments were read :—

SCRUTTON L.J. Mr. Cyril Tolley is a prominent amateur golfer, and has been twice amateur champion of England. To receive, because of his skill as a golfer, remuneration either directly or indirectly from any firm dealing in goods relating to the playing of the game may seriously prejudice his amateur status and disparage him among his golfing friends. Some golfers eat chocolate to sustain themselves while playing a round which may in some cases and with some players take three hours. Mr. Tolley, by his appearance and size and the vigour with which he hits the ball, is a welcome subject for caricaturists. He does not eat Fry's chocolate, either while playing or otherwise, and never has.

Under these circumstances, in June, 1928, there appeared in a number of papers an advertisement of Fry's chocolate. In the midst of statements about kinds and prices of Fry's chocolate there appeared a caricature of Mr. Tolley hitting one of his most vigorous drives, with a carton of Fry's chocolate sticking prominently out of his pocket and a comic caddy dancing with another carton of Fry's chocolate in his hand, and comparing in doggerel verse the excellence of the drive with the excellence of the chocolate.

Mr. Tolley was, as most people would be, much annoyed at this piece of offensive vulgarity, which reflects very little credit on the good taste of those who control the advertising of Messrs. Fry. He does not eat Fry's chocolate, and his permission for the appearance of the cartoon had not been asked. He brought an action for libel; the defendants called no evidence; the judge ruled that the cartoon interpreted by the evidence called was capable of a defamatory meaning; a common jury found it was defamatory and awarded 1000*l*. damages.

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(1) (1899) 80 L. T. 556.

(2) (1906) 22 Times L. R. 532.

(3) Times, January 29, 30, 1907.

(4) Times, June 27, 30, 1914.

The defendants appealed and took two points: (1.) the cartoon with the evidence was not capable of a defamatory meaning; (2.) damages excessive. Then there was also a third point, which Mr. Norman Birkett said was difficult to express in words, but which, as he never made me understand what it was, I cannot deal with.

Prima facie the cartoon is not libellous. It is not libellous in the absence of evidence to say that A uses X's soap, even if he does not. But, as Lord Blackburn said in *Capital and Counties Bank* v. *Henty* (1): "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances."

But if it is proved (1.) that advertisers generally or frequently pay distinguished persons for allowing commendation of their goods to be published; (2.) that such payment is regarded in the plaintiff's sphere as discreditable and derogatory of his position: (3.) that A does not use X's soap, and did not consent to his name being used in connection with it, I think the apparently innocent words would be capable of a defamatory meaning.

In this case evidence was given to show a defamatory character in the cartoon. Mr. Tolley's view was that reasonable people would think he would not allow this cartoon to appear unless he got something for it, and if he did his amateur status as a golfer would be imperilled. He called Mr. Storey, another golfer who had represented England in international contests, who said that a representation that an amateur golfer had lent himself with or without remuneration to an advertisement of a firm's goods would damage his reputation and lead to the impression he was not preserving his amateur status. He also called the secretary of two well known golf clubs, who said that unless a golfer proved

(1) 7 App. Cas. 741, 771.

that he had nothing to do with his appearance in such an advertisement he would probably be called upon to resign from his club.

But the thing which impresses me most is the correspondence between the defendants and their advertising agents. The defendants from the first thought there was a risk of actions for libel in respect of these cartoons and wanted the advertising agents, who had suggested the cartoons, to guarantee them against such actions. This the advertising agents would not do, though they suggested there was very little risk. But in the course of this correspondence the experienced advertising agents, who know all about how advertisements are constructed, wrote this letter in answer to a suggestion by Frys that Miss Helen Wills and Miss Betty Nuthall, two very distinguished lawn-tennis amateurs, should appear in their series of cartoons instead of Mademoiselle Suzanne Lenglen, who was then a professional. They say: ". . . . you returned the Suzanne layout with the suggestion that we should feature either Helen Wills or Betty Nuthall instead. We feel that there are several things which make this undesirable. Firstly, both Betty Nuthall and Helen Wills are amateurs, and in tennis circles, even more than in golf circles, the amateur status must be carefully guarded, hence, if Cyril Tolley has any quarrel with us, it is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes."

This seems to me to be good evidence that experienced advertising agents thought that these cartoons would affect or prejudice the amateur status of the two amateur ladies, though they would not affect the status of the professional lady. This can only be because the cartoons might impute that in money or kind their subjects had been remunerated for allowing their names to appear.

The judge has to decide whether the publication complained of is capable of being understood by reasonable people as bearing the meaning alleged or a defamatory meaning. He is not to decide what its meaning is, but what meanings it is capable of bearing to reasonable people; and a King's Bench judge who deals with juries soon learns that the fact that he takes a particular view does not mean that no other is reasonable.

Acton J. ruled that the cartoon explained by the evidence was capable of bearing a defamatory meaning. The attack on this ruling, as I understood, was this. No evidence, it was said, was called to show that people were in fact paid for allowing their names to be used to advertise goods. Therefore the evidence as to prejudicing amateur status was irrelevant, for the link that was to connect the cartoon with the damage to amateur status was not proved if it was not proved that people were paid in respect of advertisements using their names as in the cartoon.

I do not know if a judge is allowed to know of the Duchess who made an income by vowing that "her complexion derived its perfection from somebody's soap, which it doesn't," or to know that Gilbert would not have written those lines if less exalted though more prominent people than Duchesses did not receive payment for allowing their names to be used as advertisements of goods. It is difficult to know what judges are allowed to know, though they are ridiculed if they pretend not to know. A jury is certainly allowed to know something not in the evidence when they are constantly told to use their knowledge "as men of the world" in interpreting the evidence.

In the light of the advertising agents' letter I think there is ample evidence on which the judge might rule that the cartoon was capable of being construed by reasonable men as a publication imperilling Mr. Tolley's position in the world of golf by suggesting that he was departing from his amateur status by allowing his name to be used with or without remuneration in advertising goods which golfers might buy. I do not see why reasonable men should be expected to contemplate that Frys, a firm bearing an honoured name, were perpetrating the offensive vulgarity of representing that a man who did not use their goods did use them, in order to sell their goods, and of doing this without ascertaining if the man in question objected.

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I am of opinion that the ruling of the learned judge on this point was correct, and that the appellants are not entitled to judgment in the action.

I prefer to say nothing about *Henty's* case (1), where six judges thought the circular was incapable of a defamatory meaning and five judges thought that it was capable, except (1.) that a circular limited in publication by a person who had an interest to persons who had a corresponding interest was privileged though defamatory, if no malice was proved, and (2.) that apart from privilege I have some difficulty in understanding Lord Blackburn's view (2) that the circular incapable of a defamatory meaning to a limited audience might be capable of a defamatory meaning if published more widely.

The question of excessive damages is more difficult. The Court is very slow to interfere with the verdict of a jury on the question of "libel or no libel," or the amount of damages, which need not be limited to damage actually proved but may express the disapproval of the jury of the conduct of the defendant. But there are some limits to the power of a jury, and the damages must have some reasonable relation to the facts of the case, some reasonable relation between the wrong done and the solatium applied. An interesting example of the process by which a very distinguished judge convinced himself that the damages were excessive will be found in the judgment of Hamilton L.J. in *Greenlands Ld.* v. *Wilmshurst* (3): "Still, in my opinion by no formula or manipulation can 1000*l*. be got at. For any damage really done, 100*l*. was quite enough; double it for the sympathy; double it again for the jury's sense of the defendants' conduct, and again for their sense of Mr. F. E. Smith's. The product is only 800*l*. I am aware that 'in libel the assessment of damages does not depend on any definite legal rule': per Lord Watson in *Bray* v. *Ford*. (4) There must be some reasonable relation between the wrong done and the solatium applied." And acting on that working out, Hamilton L.J. thought there should be a new trial on the ground of excessive damages.

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(1) 7 App. Cas. 741.
(2) Ibid. 786, 787.
(3) [1913] 3 K. B. 507, 532.
(4) [1896] A. C. 44, 50.

Giving the best consideration to the facts of this case, to the damage actually done, and the conduct of the defendants (of which I strongly disapprove), I think a verdict of 1000*l.*, which surprises in itself, was excessive, and that there must be a new trial. The excessive damages lead to the suspicion that the jury may not have calmly considered the whole case, and I should order a new trial of the whole case. As my brothers take a different view, the order of the Court will be in accordance with their judgments.

GREER L.J. This is an appeal by the defendants against a verdict and judgment given in an action for damages for libel.

The plaintiff alleged that an advertisement of the defendants' chocolate appearing in the Daily Mail, and a similar advertisement in the Daily Sketch, were libels on him. At the trial before a judge and a jury the judge overruled the contention of the defendants' counsel that the advertisement was incapable of a defamatory meaning and left the case to the jury, who found for the plaintiff and awarded him 1000*l.* damages. The defendants ask this Court to enter judgment for them, on the ground that the advertisement was incapable of the alleged or any defamatory meaning. Alternatively they ask for a new trial on the ground that the damages awarded are excessive.

I have come to the conclusion that the defendants are entitled to succeed on this appeal, and have judgment entered for them with costs.

I have come to this conclusion with regret. Some men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated as matters of public interest, and almost as public property. On the other hand a great many people outside the professions I have referred to resent any attempt to utilize their names or their doings as public

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property. And I can very well imagine that an amateur sportsman, though success necessarily brings about a certain amount of publicity, strongly objecting to the use of his name in connection with an advertising campaign aimed at increasing the sales of a commodity which he may either dislike, or at any rate in which he is not the least interested. I have no hesitation in saying that in my judgment the defendants in publishing the advertisement in question, without first obtaining Mr. Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law: *Dockrell* v. *Dougall* (1) and *Corelli* v. *Wall.* (2)

Therefore, what we have to determine in this appeal is whether the publication complained of was proved to contain, expressly or by implication, a statement defamatory of the plaintiff within the meaning of the word in the law of defamation. The plaintiff's case is thus stated in paras. 3 and 4 of the statement of claim: " In the issues of the Daily Sketch newspaper of June 20, 1928, and the Daily Mail newspaper of June 22, 1928, the defendants falsely and maliciously published an advertisement of chocolate sold by the defendants which said advertisement included a picture of the plaintiff depicted as playing golf with a packet of the defendants' chocolate protruding from his pocket and beneath the said picture the words following, that is to say:

'The Caddy to Tolley said " Oh, Sir!
Good shot, Sir, that ball see it go, Sir!
My word, how it flies,
Like a cartet of Fry's,
They're handy, they're good and priced low, Sir!" '

" (4.) The defendants thereby meant and were understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate, that he had done so for gain and reward, that he had prostituted his reputation as an amateur golf player for advertising purposes, that he was seeking notoriety and gain by the means aforesaid and that he had been guilty of conduct unworthy of his status as an amateur golfer."

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(1) 80 L. T. 556.

(2) 22 Times L. R. 532.

Words are not defamatory unless they amount to an attack on a man's reputation or character; they must tend to disparage him in the eyes of the average sensible citizen. Words are not actionable as defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community, but will not affect his reputation in the eyes of the average right thinking man, is not actionable within the law of defamation; see for example *Miller* v. *David* (1); *Mawe* v. *Pigott.* (2) To say of an amateur golfer that he is an advertising agent, or that he is the head of Messrs. Fry's advertising department, might occasion some people to feel less friendly to him than if they were told he was a stockbroker. On the other hand there might be some people who would consider stockbroking a less reputable occupation than the sale of wholesome chocolate. When the point arises whether words are capable of a defamatory meaning, the question is: Are they capable of being construed as a statement of something that would be regarded by ordinary reasonable people as disparaging to his character or reputation, and calculated to bring him into ridicule, dislike, or contempt? It is important to observe that in order to make any one liable in an action based on defamation, it must be proved that he made some defamatory statement about the plaintiff. Truth or justification is always a good defence. It is not sufficient to make a defendant liable, to say he has written something which is strictly true but which has caused some people to attribute as a reason for the statement a fact that is very

(1) (1874) L. R. 9 C. P. 118. (2) (1869) Ir. R. 4 C. L. 54.

damaging to the plaintiff. A trader may say: "I will no longer accept cheques on the C Bank." A great many people may naturally enough think that the reason why the trader will not accept the bank's cheques is that the bank is in financial difficulties. The trader has a good answer to a claim for damages for libel. He is entitled to say: "I said nothing about the financial condition of the bank, indeed I said nothing about the reasons for my refusal to accept the bank's cheques; the words I used do not express or imply anything about the financial condition of the bank." In *Capital and Counties Bank* v. *Henty* (1) it was held that brewers who had sent out to their customers a circular to the effect that they would no longer accept cheques on the plaintiff bank in payment of their accounts could not be held liable in an action for libel, in the absence of proof of special facts entitling the person to whom the circular was sent to attach a special meaning to the circular in excess of the words used. Similarly it has been held not to be defamatory of an agent or servant to publish that his employment has ceased, and that he is no longer authorized to receive moneys on behalf of his former employers: *Nevill* v. *Fine Art and General Insurance Co.* (2); *Mulligan* v. *Cole.* (3) No doubt if special facts were proved to be known to the persons to whom the information was sent, which would lead a reasonable person knowing those facts to conclude that the words impliedly stated that the plaintiff had been discharged for misconduct, the case would have been left to the jury, but as there was no such evidence, it was held that the words were incapable of a defamatory meaning. The evidence required is evidence of special facts, causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge. It is not proof of a special fact in this sense merely to call a number of people to say that they understood the words in a defamatory sense; they would have to prove some fact known to them which would be sufficient

(1) (1880) 5 C. P. D. 514; affirmed 7 App. Cas. 741.

(2) [1897] A. C. 68.

(3) L. R. 10 Q. B. 549.

to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense. In the present case it was conceded that unless the advertisement had the meanings, or some of the meanings, set out in the innuendo, it was not libellous. The plaintiff did not complain of the caricature in itself. His complaint was that the advertisement caused people to think (1.) that he had consented to being represented as assisting to advertise Fry's chocolate; and (2.) that he had been paid for doing so. I do not think that the complaint as to (1.) was serious. The plaintiff's real objection was that he thought he was being accused of receiving money for advertising Fry's chocolate, and that this would damage him in his reputation as an amateur golfer. He did not and could not say it would disqualify him if true from competing as an amateur, but only that it would cause his amateur status to be suspected. The answer to this contention on behalf of the plaintiff is that the advertisement does not make any statement to the effect that the plaintiff had assented to the publication of the advertisement, and there is certainly no allegation contained in it that he had been paid for his consent. Neither (1.) nor (2.) can be rightly said to be stated by the picture or the words of the advertisement. No evidence was given or tendered of any special facts known to people to whom the libel was published, entitling and causing them to attach to the advertisement the meaning alleged in the innuendo, or any part of such meaning.

It was argued that the necessary evidence could be found in the correspondence between Messrs. Fry and their advertising agents. I can find nothing in this correspondence amounting to evidence of any special facts which would entitle the reader of the advertisement to conclude that there was implied in it a statement either that Mr. Tolley's consent had been obtained, or that he had been paid for it. On the contrary, the correspondence shows that the advertising agents did not in general consider it usual or necessary to obtain the consent of the subjects of the caricatures, and they certainly did not propose to pay any of them. They had been advised by counsel that the Tolley caricature was not libellous, but they were not prepared to guarantee that Mr. Tolley would not bring an action in respect of it. The evidence contained in this correspondence, in my judgment, falls far short of being evidence of facts which would entitle a special defamatory meaning to be attributed by the jury to words otherwise innocent.

For these reasons I think the learned judge was wrong in refusing to enter judgment for the defendants, and this appeal must be allowed with costs, and judgment entered for the defendants with costs. I should have preferred to say there should be no costs, as I disapprove of the defendants' conduct in utilizing Mr. Tolley's justifiable reputation as a golfer for their own purposes without his consent, but I am afraid this would not be regarded as a good ground in law for depriving them of costs.

In any event I agree with my Lord that the damages were excessive, that is, such as no reasonable jury could give, and the appellants would in any event have been entitled to a new trial.

SLESSER L.J. This appeal arises out of an action brought by Mr. Cyril Tolley, a well known amateur golf player, against Messrs. Fry & Sons, Ld., manufacturers and vendors of chocolate, for damages for libel in respect of advertisements of chocolate contained in the issue of the Daily Sketch newspaper of June 20, 1928, and the Daily Mail newspaper of June 22, 1928, which advertisements included a picture of the plaintiff playing golf, with a packet of the defendants' chocolate protruding from his pocket. [The Lord Justice read the legend set out at p. 468, ante.]

It was conceded at the Bar on behalf of the plaintiff and admitted by the plaintiff himself in evidence that the advertisement was not, on the face of it, defamatory, and reliance is placed solely on an innuendo which is said to arise therefrom and to be defamatory of the plaintiff. The innuendo complained of is pleaded in the following terms: [as set out at p. 468, ante.]

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The defendants admit that they published the advertisements but say that they are incapable of the alleged or any defamatory meanings; they further plead that the advertisements without the alleged meaning are not libellous, which matter, as I have said, is not really in issue in this case. It is, therefore, necessary, in the first place, critically to examine the innuendo upon which the plaintiff bases his case. It is composed of four separate averments that the defendants meant and were understood to mean first, that the plaintiff had agreed or permitted his portrait, and (presumably) the legend, to be exhibited for the purposes of advertisement; secondly, that this agreement or permission was for gain or reward; thirdly, that by so doing he had prostituted his reputation as an amateur golf player for advertising purposes for notoriety and gain; and, fourthly, that he had been guilty of conduct unworthy of his status as an amateur golf player.

Before dealing with the actual evidence, if any, adduced in support of this innuendo in the case, I propose to consider the law applicable to it.

This is an action in which the matter published, without reference to extrinsic facts, could not convey, and it is not suggested that it does convey, any defamatory imputation, but it is, of course, open to the plaintiff by evidence to prove that the matter published in this particular case necessarily conveyed to the mind of a normal person, cognizant of some special circumstances, a meaning which, in the absence of such special circumstances, it would not or might not have conveyed, and it may well be that, in this secondary sense, a publication will be of defamatory matter though in its primary immediate sense it is not defamatory. In *Capital and Counties Bank* v. *Henty* (1) Lord Blackburn, speaking of the substitution of such secondary sense for a prima facie sense, says (2): "The manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is

(1) 7 App. Cas. 741. (2) 7 App. Cas. 771.

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calculated to convey a libellous imputation." And, in *River Wear Commissioners* v. *Adamson* (1), the same learned Lord, dealing obiter with libellous publications, discusses how matter, which prima facie and considered apart from the facts to which it was intended and understood to relate would be wholly innocuous, may be shown to bear a very different meaning. It is true that in that case the question to be considered was one of interpretation to be placed upon a statute, but libel is directly referred to by way of illustration. In referring to the old rules of pleading as to innuendoes in defamation: "No innuendo," he says (2), "could enlarge the sense of the words beyond that which they prima facie bore, unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published, ... of and concerning those facts. . . . . The Legislature has rendered it no longer necessary to set out on the record the facts and the colloquium necessary to support an innuendo; they are now only matter of proof on the trial; but the principle remains."

It is thus clear law that the burden is put upon the plaintiff who relies upon defamation derived from secondary sense to prove his contention. Lord Watson in *Capital and Counties Bank* v. *Henty* (3) says (4): "The appellants have failed to prove facts and circumstances leading to the conclusion that it [i.e., the alleged libel] must have been so understood by those who received it." See also *Frost* v. *London Joint Stock Bank* (5), where the facts are similar, and the principles of the decision in *Capital and Counties Bank* v. *Henty* (3) were followed and applied.

In this case the innuendo is of a very unusual kind—unusual, that is, in that although the pleading says "that the words meant and were understood to mean" in the usual form, in fact the suggestion made is not, as is generally the case, that the words as such meant and were understood to mean something defamatory, but that the fact or manner of publication itself as such gave rise to suggestions injurious to the plaintiff's reputation. A case in which not dissimilar contentions were raised is to be found in *Dockrell* v. *Dougall* (1), in which a doctor, whose name had been used without his authority in an advertisement to boom a sale of medicine, was held to have no claim for damages or for an injunction, unless the publication was defamatory, or injured him in his property, business or profession. The facts of that case were that the defendant was the proprietor of a recipe for making a certain liquid called Sallyco and published in an advertisement thereof that Dr. Dockrell was prescribing it as an habitual drink. The advertisement went on: "Dr. Dockrell says 'Nothing has done his gout so much good.'" The statement of claim, among other things, alleged that the plaintiff did not consent to the use of his name and that he was likely to be brought into contempt and to be considered as guilty of an attempt to advertise himself contrary to the rules of the medical profession. In the event it appears that the plaintiff gave no evidence of actual damage and that the defendant gave evidence to show that the plaintiff did in fact prescribe the liquid and did state that he had received benefit from it for gout, and Ridley J. left the question to the jury: "Was the matter complained of libellous? If libellous, was it true?" The jury upon this found that the matter was not libellous and, when the matter reached the Court of Appeal, it was argued solely on the ground of a right to an injunction to restrain the use of the plaintiff's name without his permission, a ground which, very naturally, failed. But it is clear from the judgment in the Court of Appeal that both Vaughan Williams and Romer L.JJ. considered that it was open to a jury, if they thought fit, to say that the publication in question was defamatory. Thus, Romer L.J. says (2): "There is no libel upon the plaintiff in his profession. There is no defamation of the plaintiff. If in the circular there were an untrue statement that the plaintiff had assented to the use of his name, and damage had thereby been caused to the plaintiff in his profession, the

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(1) (1877) 2 App. Cas. 743.
(2) Ibid. 763.
(3) 7 App. Cas. 741
(4) Ibid. 788.
(5) (1906) 22 Times L. R. 760.

(1) 80 L. T. 556. (2) 80 L. T. 558.

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plaintiff might succeed. But the plaintiff has not established that case. There is no finding of the jury that there was an untrue reference to the plaintiff from which damage flowed to the plaintiff. We cannot say that there was any such reference from simply reading the circular. If the plaintiff wished to establish such a case he ought to have obtained a proper finding from the jury, and he has not done so." And again, Vaughan Williams L.J. says (1): "As to reputation, that is disposed of by the verdict on the question of libel."

This case seems to indicate that the mere fact that the defamation complained of does not arise from the words themselves as such but rather from the use of them collectively, as in an advertisement, does not necessarily deprive the plaintiff of the right of saying that in the special circumstances they defame him. The case, from this point of view, is not unlike those in which, without the authority of an author, literary work is published in his name which, at the date of the publication, had he been the author thereof, would have tended to injure his reputation: see *Archbold* v. *Sweet* (2)—an action by the author of Criminal Pleading for publishing a third edition of his work by another hand containing errors, on which Lord Tenterden C.J. says that the imputation of the edition to the plaintiff would, owing to errors, be injurious to the plaintiff's reputation. In the result, damages were given for the plaintiff with leave to move for a non-suit, which motion was never pursued; and, apart from authority, in my judgment, there is no inherent objection in law to an action such as pleaded in this case.

The question next arises whether, in the particular circumstances here, having regard to the evidence adduced, the learned judge was justified in leaving the case to the jury at all. The question whether there is or is not a libellous publication is, in the first instance, for the judge. It is for him to decide "that the matter which is charged as libellous shall be capable of being and apparently is libellous, calculated to bring the person into hatred, contempt or ridicule": per

(1) 80 L. T. 558.

(2) (1832) 5 C. & P. 219.

Lord Halsbury, L.C. in *Nevill* v. *Fine Art and General Insurance Co.* (1); "If there is controversy as to whether the words used are defamatory or not, it is for the judge to determine whether they are capable of a defamatory meaning": per Lord Dunedin in *Adam* v. *Ward.* (2) I have already had occasion to observe that the innuendo here depends upon the proof of certain averments of which the first is that the defendants meant and were understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of advertisement, and it is necessary to consider whether any evidence of this preliminary and necessary allegation was tendered at the trial. From the decision in *Capital and Counties Bank* v. *Henty* (3) it appears, generally speaking, that many conditions must co-exist to prove defamation in a secondary sense: (1.) extraneous facts; (2.) knowledge thereof on the part of the defendant; (3.) similar knowledge on the part of the class of persons to whom the matter is published; (4.) a knowledge by the defendant that the class will be acquainted with the special circumstances; (5.) the practical certainty—possibility merely will not do—that the particular secondary meaning will be conveyed to the class of persons; and (6.) that such persons are persons of ordinary intelligence: see Bower on Defamation, 2nd ed., p. 39. I accept this exposition in general terms so far as it is necessary for the purposes of this case, and proceed to consider what evidence was here actually tendered. No evidence of any special circumstances was adduced: the material witnesses, apart from the plaintiff himself, were a Mr. Storey, a stockbroker and amateur golfer, and a Mr. Hobson, the former secretary of a large golf club. Neither of these witnesses adduced any evidence of special circumstances or that they or the public would think that the plaintiff had agreed or permitted his portrait to be exhibited as alleged and, indeed, Mr. Storey had the following question put to him by Mr. Rayner Goddard: "Assuming that an amateur golf player allowed himself, or supposing it was

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(1) [1897] A. C. 68, 72.
(2) [1917] A. C. 309, 329.
(3) 7 App. Cas. 741.

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represented had lent himself to an advertisement of a firm's goods, either for remuneration or for no remuneration, what injury would that do to his reputation and status as an amateur golfer ? " Throughout the examination of these two witnesses such an assumption was implicit.

If then it cannot be said that there is oral evidence that the public would understand that the plaintiff allowed himself to be advertised as here complained, was there any other evidence before the Court which was proper to be laid before the jury ? Reliance is placed upon a mass of correspondence which passed between the advertising agency and the defendants in which, apparently, both parties were at pains to satisfy themselves that no libellous matter would be put in the advertisements, and, particularly, on June 4, 1928, there appears, in a letter to Messrs. Fry from the advertising agents, the following passage : " The amateur status must be carefully guarded." It is argued that this letter recognizes that the public would assume that the plaintiff had consented to the advertisement, for, it is said, if they were not to so assume, why should the letter refer to the fact that Miss Betty Nuthall and Miss Helen Wills may object as amateur tennis players to advertisements in which they respectively might figure ? In my view no such inference may properly be drawn from this letter or any other of the letters relied upon. Particular emphasis in this connection is laid upon a passage in the letter of June 4 : " It is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes," and on this the plaintiff says the defendants must have assumed that the public would say that they were advertising Mr. Tolley without his consent, as otherwise their fears would be meaningless ; but it may well be that the defendants and the advertising agents, ignorant of the decision in *Dockrell* v. *Dougall* (1) and other cases that the bare unauthorized use of a name is not actionable without more, may have thought that an unauthorized use of the plaintiff's name would be illegal, or, again, that the advertisement

(1) 80 L. T. 556.

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showing amateurs dependent upon chocolate for their success was defamatory on the face of it; nor is there any other letter in the correspondence which, in my view, carries the matter any further.

In my judgment, if, apart from evidence of special circumstances or interpretation, it is suggested that the defendants, by the publication, would be understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited by reason of the fact that the ordinary man would necessarily draw the inference that no such advertisement could appear without the consent or permission of the person advertised, I must hold that I do not think that the Court is justified in saying that there is any sufficient material on which a jury should be asked to make this assumption. Apart from specific evidence, a judge ought not to take into account mere conjectures which a person reading a document might possibly, though unreasonably, form: per Lord Selborne L.C. in *Capital and Counties Bank* v. *Henty.* (1) Conclusions which other persons may unreasonably draw from the words complained of, cannot be relied upon in support of the plaintiff's case: per Brett J. in *Hunt* v. *Goodlake.* (2) And, again, to quote the same learned judge in *Capital and Counties Bank* v. *Henty* (3): "It seems to me unreasonable that, where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document." Finally, in *Stubbs Ld.* v. *Russell* (4), a case in which the pursuer's name was wrongly put in a weekly list of persons against whom decrees had been obtained in the small debts courts, an explanatory note being attached that publication of the decree did not imply inability to pay on the part of those in the list, Lord Kinnear said (5): "An injurious inference might no doubt have been drawn, if inability to pay a just debt were the only reason which could account for a decree in absence being allowed to pass in a small debt court. But, as the appellants' counsel very forcibly pointed out, such a thing may happen from a variety of causes that are perfectly consistent with solvency and honest intention on the part of the debtor. If this were all, the question would be whether a publication is libellous because one out of various possible inferences from the facts which it states may be injurious while others are harmless."

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(1) 7 App. Cas. 741, 744.

(2) (1873) 43 L. J. (C. P.) 54, 56.

(3) 5 C. P. D. 514, 541.

(4) [1913] A. C. 386.

(5) [1913] A. C. 392.

The final matter which has to be considered arises out of the conduct of the case itself, for it would appear from the transcript of the argument of counsel that Mr. Goddard on behalf of the plaintiff was prepared at one time to tender certain evidence in addition to that which was actually adduced. He says: "I propose to ask them" (the proposed witnesses) "the impression formed on their minds on seeing the advertisement," and continues: "I do so on the authority of the case of *Kenny* v. *Freeman's Journal Co.*" (1) This case establishes, under the great authority of Palles C.B., what I should have thought in any event was clear, that in a case of innuendo dependent on extrinsic circumstances, evidence may be adduced, but only when the special circumstances are established, how the alleged defamatory matter impressed persons to whom the matter was published. As is stated in the headnote to *Daines* v. *Hartley* (2): "In an action for words spoken or written, the ordinary sense of those words is to be taken as the meaning of the speaker or writer, unless something be shewn to have taken place which may give a peculiar character to the expressions used. In the absence of any such evidence, a witness cannot be asked the question: 'What did you understand by the words?' The proper course to be adopted is first to lay the foundation by giving such evidence, and then the question becomes admissible." Nevertheless, in this case, the learned judge appears to have been reluctant to receive this evidence, and Mr. Goddard again submits: "That the jury are entitled to be informed of the impression that this has made upon members of the public." In the event, the learned judge says: "You may, I suppose, certainly call witnesses who have expert knowledge and intimate inside acquaintance with the management of golf competitions

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(1) (1892) 27 Ir. L. T. 8.

(2) (1848) 3 Ex. 200.

. . . . but that is quite a different thing." And Mr. Goddard concludes: "Then, my Lord, I will confine my evidence to that." The learned judge continued: "Inasmuch as it"—the picture—"deals with a highly specialised matter of which, as you might truly say, some members of the jury might be quite ignorant, I suppose you may call witnesses to say—any suggestion that an amateur golfer of eminence and celebrity is receiving remuneration for allowing his name to appear, might be very prejudicial." Mr. Goddard concludes: "For the moment the evidence I will tender will be to that effect." In the final result the question went to the jury without any evidence at all to support the innuendo that the defendants meant and were understood to mean that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendants' chocolate, and, if this be so, the further question that the words meant and were understood to mean that he had done so for gain or reward or that he had prostituted his reputation as an amateur golf player for advertising purposes does not arise.

I do not think that, giving the matter full consideration, and with every regard to the very undesirable conduct of the defendants in making free with the names of famous people without their consent, there was any evidence to support the innuendo on which the jury might properly find for the plaintiff. The plaintiff has failed to prove the necessary facts to support the innuendo, and, with this failure, the whole basis of the alleged defamation goes, and, in the absence of essential evidence, I am of opinion that the learned judge should have declined to leave the case to the jury and that this appeal should be allowed.

I would add that in any event I think the damages awarded are excessive, but in the view I have formed of the case no remedy on this head becomes necessary.

Appeal allowed.

Solicitors for appellants: *Pritchard, Englefield & Co., for Osborne, Ward, Vassall, Abbot & Co., Bristol.*

Solicitors for respondent: *Cohen & Cohen.*

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Dec. 10.

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[1929. R. 159; 652.]

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Money-lender—Loan Transaction—Excessive Interest—Burden of Proof—Promissory Note sole Security—Note or Memorandum of Contract—Reference to Security—Parol Evidence identifying Security—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *ss.* 6, 10.

Money-lenders brought an action against a borrower to recover sums of 200*l.*, 100*l.*, and 100*l.* lent by them to the borrower and alleged to be due upon three promissory notes payable at a specified address, the first in fourteen monthly instalments with interest at 60 per cent. per annum, and the others in three months after their respective dates with interest at 80 per cent. per annum until payment. If default were made the whole unpaid principal and interest thereon became due and was to carry interest in the case of the first sum at 60 per cent. per annum and in the case of the other two sums at 80 per cent. per annum from the date of default until payment.

By s. 6 of the Moneylenders Act, 1927, no contract for the repayment by a borrower of money lent by a money-lender is enforceable unless, before the money was lent, a note or memorandum containing all the terms of the contract was made and signed by the borrower and unless a copy of it was delivered to him within the prescribed time. In intended compliance with this section, in each case before the money was lent there was made and signed by the borrower a note or memorandum of the contract stating that the sum referred to therein was advanced on the security of a promissory note, but not stating where repayment of the sum was to be made. Copies of the notes or memoranda were duly delivered to the borrower:—

Held, by Scrutton, Greer and Slesser L.JJ., that the note or memorandum in each case was sufficient:

By Scrutton and Greer L.JJ. on the ground that the promissory note given as security for the repayment of each sum might be identified by parol evidence as the promissory note mentioned in the note or memorandum of the contract for the repayment of that sum:

By Slesser L.J. on the ground that in each case the promissory note only differed from the memorandum in expressing a duty which was implied in the memorandum—namely, the duty of a debtor to seek his creditor.

The Court, without deciding the point, inclined to the view that the terms of a security given for repayment of a loan need not be set out in the note or memorandum of the contract, at any rate where the security does not impose terms more onerous than those stated in the note or memorandum.

By s. 10, sub-s. 1, of the Moneylenders Act, 1927, where in any proceedings in respect of any money lent by a money-lender .... or in respect of any agreement or security made or taken it is found that the interest charged exceeds the rate of 48 per cent. per annum . . . . the Court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable.

Held, by the Court that, where the interest charged exceeds the rate mentioned, this sub-section imposes on the money-lender the burden of showing that the interest is not excessive and that the transaction of loan is not harsh or unconscionable; and that in the circumstances the plaintiffs had in each case discharged themselves of this burden.

Carringtons, Ld. v. *Smith* [1906] 1 K. B. 79 followed.

Judgment of Rowlatt J. affirmed.

APPEAL from the judgment of Rowlatt J. in an action tried before the learned judge without a jury. The facts and circumstances of the loans, the subject of the action, are particularly stated in the judgment of Scrutton L.J. The following short statement will show the nature of the case.

The plaintiffs, a firm of registered money-lenders carrying on business at 84 Jermyn Street, London, S.W., claimed a sum of 358*l.* 3*s.* 5*d.*, being the amount of principal and interest alleged to be due from the defendant on three promissory notes dated respectively January 13, July 5 and December 27, 1928.

The defendant, a man of forty years of age, carried on the business of a dealer in antiques and objects of art in King Street, St. James's, S.W. His business was a speculative one. To obtain satisfactory profits he had often to wait a long time before he could meet with a purchaser willing to pay the price at which he was prepared to sell. In the meantime he found that the most convenient way of obtaining money for current expenses was by means of small loans from a firm of money-lenders named B. Lipton, Ld., for repayment of which he offered no security but his promissory notes and on which he paid interest at 60, 80 or even 90 per cent. per annum. B. Lipton, Ld., went into liquidation in 1926, and in 1927 the plaintiffs purchased the assets of that company and took over their business. The defendant began borrowing from B. Lipton, Ld., at the end of 1925. At that time he owed about 3000*l.* to a money-lender named Lewis. He had paid off this sum by July, 1927.

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The first promissory note was in the following form: "200*l*. London, S.W. January 13, 1928.—I promise to pay Reading Trust, Ld., or order at 84 Jermyn Street, London, S.W., the sum of 200*l*. this day advanced by you to me, together with interest thereon at the rate of 60 per cent. per annum by monthly instalments of 20*l*. each for thirteen months and the balance on (sic) the fourteenth month, the first of such instalments to be made on the thirteenth day of February, 1928, and the balance on March 13, 1929, and in the event of default in payment of any instalment or part thereof then so much of the balance of the said sum of 200*l*. as represents the balance of principal remaining unpaid together with interest at the rate of 60 per cent. per annum to date of default shall immediately become due and payable, together with interest on the amount then due whether in respect of principal or interest from the date of such default until payment at the rate of 60 per cent. per annum. Signed Alfred Spero."

By s. 6, sub-s. 1, of the Moneylenders Act, 1927 (1), no contract for the repayment by a borrower of money lent by

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(1) Moneylenders Act, 1927, s. 6, sub-s. 1: "No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be."

Sub-s. 2: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

Sect. 10, sub-s. 1: "Where, in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money a money-lender shall be enforceable unless a note or memorandum in writing of the contract is made and signed personally by the borrower, and unless a copy thereof is delivered to the borrower within seven days of the making of the contract; and the note or memorandum must be signed by the borrower before the money is lent. By sub-s. 2 the note or memorandum must contain all the terms of the contract.

The memorandum of the contract of loan was in the following form: "To Messrs. Reading Trust, Ld., 84 Jermyn Street, London, S.W.—This is a note or memorandum of contract for a loan on the following terms: The principal sum shall be 200*l.* and shall be advanced on January 13, 1928.

"The principal sum shall be repaid, together with interest at the rate of 60 per centum per annum by consecutive monthly instalments of 20*l.* each, the first of such monthly instalments of 20*l.* to be due and payable on February 13, 1928, and the balance on March 13, 1929. In case of default in payment of an instalment or any part thereof the whole of the balance of the said sum of 200*l.* remaining due together with interest at the rate aforesaid to the date of default shall immediately become due and payable, and such balance of principal and interest shall carry interest from the date of such default until payment at the rate of 60 per centum per annum, and I agree the above rate of interest to be a fair rate for the risk taken by you in advancing me the said sum of 200*l.* on the security of a promissory note only.—Dated this 13th day of January, 1928.

"This note or memorandum is signed before the principal sum is advanced and before the security stated above is taken.

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lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per cent. per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per cent. per annum, is excessive."

"I acknowledge having received a true copy of this memorandum of contract. Signed Alfred Spero."

On July 5, 1928, the defendant borrowed a sum of 100*l.* upon the security of a promissory note in the following terms: "120*l.* London, S.W. July 5, 1928.—Three months after date I promise to pay Reading Trust, Ld., or order at 84 Jermyn Street, London, S.W., the sum of 120*l.* (being 100*l.* this day advanced with 20*l.* interest which is equivalent to the rate of 80*l.* per centum per annum as calculated in accordance with schedule I. of the Moneylenders Act, 1927). This note to carry interest at the rate of 80*l.* per centum per annum from date of default until payment.—Alfred Spero."

On the same day the plaintiff signed a memorandum of the contract of loan in these terms: "To Messrs. Reading Trust, Ld., 84 Jermyn Street, London, S.W.—This is a note or memorandum of contract for a proposed loan on the following terms:—

"The principal sum shall be 100*l.* and shall be advanced on this the 5th day of July, 1928, on the security of a promissory note.

"The interest shall be 20*l.* (which is equivalent to the rate of 80*l.* per centum per annum as calculated in accordance with schedule I. of the Moneylenders Act, 1927), and the total amount of principal and interest shall be paid three months after date. On default in payment thereof the amount of principal and interest shall carry simple interest at the rate of 80*l.* per centum per annum until payment.—Dated the 5th day of July, 1928.

"I have read this note or memorandum, of which I acknowledge to have received a true copy, which is signed before the principal sum is advanced and before the security stated above is given. Signed Alfred Spero."

On December 27, 1928, the defendant borrowed another sum of 100*l.* upon the security of a promissory note in these terms: "120*l.* London, S.W. December 27, 1928.—Three months after date I promise to pay Reading Trust, Ld., or order at 84 Jermyn Street, London, S.W., the sum of 120*l.*, being 100*l.* this day advanced together with 20*l.* interest, which is equivalent to the rate of 80 per centum per annum as calculated in accordance with schedule I. of the Moneylenders Act, 1927. This note to carry interest at the rate of 80 per centum per annum from the date of default until payment. Alfred Spero."

On the same day he signed the following memorandum: "To Reading Trust, Ld., 84 Jermyn Street, London, S.W. This is a note or memorandum of contract for a proposed loan on the following terms: The principal sum shall be 100*l.* and shall be advanced on this the 27th day of December, 1928, on the security of a promissory note.

"The interest shall be 20*l.*, which is equivalent to the rate of 80 per cent. per annum as calculated in accordance with schedule I. of the Moneylenders Act, 1927, and the total amount of principal and interest, 120*l.*, shall be paid three months after date. On default in payment thereof the amount of principal and interest shall carry simple interest at the rate of 80 per centum per annum until payment.—Dated this 27th day of December, 1928.

"I have read this note or memorandum, of which I acknowledge to have received a true copy, which is signed before the principal sum is advanced and before the security stated above is given. Signed Alfred Spero."

Two writs were issued; the first on January 22, 1929, and the second on April 3. The defendant by way of defence, pleaded that the plaintiffs did not deliver or send to him within seven days a note or memorandum in accordance with s. 6 of the Act of 1927; that the memorandum which was in each case delivered or sent him, and which he signed, did not contain all the terms of the agreement; that it did not set out the terms of the promissory note given by him as security for the loan and did not state that the money was to be repaid at 84 Jermyn Street as provided by the promissory note given in each case. He also pleaded that the amounts charged for interest were excessive and that the transactions were harsh and unconscionable.

By way of counterclaim the defendant alleged that the three loans, the subject of the actions, were the last of a series of loans effected first with a firm of B. Lipton, Ld., and latterly with the plaintiffs; that the interest charged on all these loans was excessive and that the transactions were harsh and unconscionable; and that all through the transactions B. Lipton, Ld., and the plaintiffs had been in partnership. The defendant therefore claimed under s. 1, sub-s. 1, of the Moneylenders Act, 1900, to reopen all the transactions between himself and the plaintiffs and B. Lipton, Ld., and to have an account taken between him and both those parties, and consequential relief. By an order in Chambers dated April 22, 1929, these proceedings were consolidated.

The learned judge gave judgment for the plaintiffs on the claims. He dismissed the counterclaim, holding that there was no evidence of a partnership between the plaintiffs and B. Lipton, Ld., and being of opinion that any relief sought against the last named parties ought to have been the subject of a separate claim against them.

The defendant appealed from the judgment.

Sir Patrick Hastings K.C. and *Harold Simmons* for the appellant. By s. 6, sub-s. 1, of the Moneylenders Act, 1927, no contract for the repayment of money lent by a moneylender is enforceable unless there is a note or memorandum containing all the terms of the contract. There is no sufficient memorandum of any of the contracts sued on in this action. The promises to repay were secured in each case by a promissory note. In each case the contents of the promissory note ought to have been set out in the memorandum; but this was not done. By the terms of the promissory notes payment was to be made at 84 Jermyn Street. The memoranda specify no place at which payment is to be made.

Secondly, the Moneylenders Act, 1900, gave the Court power to reopen any money-lending transaction if it was satisfied that the interest charged was excessive and the transaction harsh and unconscionable or in other respects

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one in which a Court of equity would give relief. Under that Act the borrower had to show that the conditions existed under which the Court might exercise its jurisdiction. Now by s. 10 of the Act of 1927, where the interest on a loan exceeds 48 per cent. per annum, it is presumed that the interest is excessive and that the transaction is harsh and unconscionable, and whereas it was formerly incumbent upon the borrower to prove these facts, now it is for the lender to prove that the interest is not excessive and that the transaction is not harsh and unconscionable, when all the facts and circumstances of the loan are disclosed. It is submitted that on the evidence the respondents have failed to discharge the onus which now lies upon them.

Eastham K.C., *Croom-Johnson K.C.* and *Wallington* for the respondents. Sect. 6 of the Act of 1927 does not prescribe that security given for repayment of a loan shall be described or embodied in the note or memorandum of the contract. It can hardly be inferred from the wording of the section that if the repayment were secured by a mortgage the mortgage deed should be set out in the memorandum. In the present case the memorandum contains all the terms of the contract as provided by sub-s. 2, and that is all that the section requires. But if it be necessary to disclose in the memorandum any security given for repayment, each of the memoranda in this case fulfils that condition. It is not necessary that a "note or memorandum" should be contained within the four edges of one piece of paper. The Legislature when using those words must have had in mind s. 4 of the Statute of Frauds and must have been aware of the decisions upon its construction. They must have intended that a note or memorandum might be contained in various documents provided they showed some literary connection upon the face of them. In each case the document described by the appellant himself as a "note or memorandum" states that the principal sum is advanced "on the security of a promissory note." At the time of signing the memorandum in each case a form of promissory note was in existence, and parol evidence was properly admissible to connect the two documents.

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When read together they do not conflict; the promissory notes which provide that payment shall be made at 84 Jermyn Street do no more than impose upon the appellant the obligation which the common law imposes upon every debtor —namely, the obligation to seek his creditor.

With regard to s. 10, no doubt the interest charged was high; but the learned judge rightly held that in the circumstances it was not excessive. A dealer who carries on a speculative business, who is unwilling to proclaim his financial position to his competitors by giving a bill of sale on his stock, and who prefers the more private and reticent method of borrowing money without giving any security but his own promissory notes, must expect to pay a high rate of interest. The appellant was plainly aware of this. Neither can the transactions be properly described as harsh or unconscionable. Both parties knew all the circumstances. It was clear that in proportion as the appellant might have to wait for his profit the respondents would have to wait for their money. The last thing he would consent to do would be to sell his stock at what he considered a loss. No undue pressure was applied and no effort was made to overreach the appellant, even assuming, what is by no means probable, that any such effort would have met with any success. In these circumstances the case comes within the authority of *Carringtons, Ld.* v. *Smith.* (1)

Sir Patrick Hastings K.C. in reply.

Cur. adv. vult.

Dec. 10. The following written judgments were delivered:

SCRUTTON L.J. In a money-lender's action, in which Rowlatt J. has refused to reopen transactions on the ground that the interest was excessive or the transactions harsh and unconscionable, the borrower appeals to this Court.

Mr. Spero, the borrower, is a man of about forty, who after the war opened in Bond Street the business of a dealer in antiques. He appears to have had no capital, but

(1) [1906] 1 K. B. 79.

purchased a large collection on credit. His prospects of success depended on his being able to hold his stock till a buyer appeared who was sufficiently desirous of any article to be ready to pay a high price for it. If his stock was sold at a forced sale, he would make a certain loss. His bank only gave him a small overdraft. He had no wish to disclose his pecuniary embarrassments to his friends in the trade; he wanted comparatively small sums to carry on his business and meet pressing liabilities. Under these circumstances he went to a money-lender, Mr. Lewis, and borrowed sums from him at a rate of interest of 60 per cent., sometimes plus a share of the profits made on sale. A quarrel arose over one of these transactions and Spero went to a firm of B. Lipton, Ld., disclosing the circumstances, and borrowed small sums from them to carry on his business, the interest ranging from 80 per cent. to 92 per cent. In the meantime he was repaying his liability to Lewis amounting originally to 2900*l.* He was not punctual in his repayments to B. Lipton, Ld., frequently having to renew as instalments fell due. The last loan by B. Lipton, Ld., was made in October, 1926. B. Lipton, Ld., dissolved as a company in 1927, and the plaintiff firm, the Reading Trust, which the judge has found to be a bona fide and separate entity, took over the benefit of Mr. Spero's obligations, and made their first fresh loan in March, 1927. He obtained from them further small loans for the purposes of carrying on his business up to the end of 1927. Most of them were punctually repaid, though some instalments had to be renewed. There was no security except promissory notes for any of these loans, no bills of sale, mortgages or pledges of goods. The interest ranged from 80 to 96 per cent. Spero quite understood what he was doing; he did not want to apply to his bank or friends for help, and he wanted the money to carry on his business and hold his stock till the hoped for willing purchaser appeared. He had now paid off Lewis.

The Moneylenders Act, 1927, came into force on January 1, 1928, and on January 13 there occurred the first transaction in respect of which the plaintiffs claim a loan of 200*l.* at 60 per cent. interest repayable in thirteen monthly instalments of 20*l.* and the balance in the fourteenth month. It was a loan to meet business liabilities. On February 27 Spero wanted another 100*l.*, which was to be repaid in three months, with interest at 80 per cent. He did repay it on June 19, but on June 22 borrowed another 100*l.* for three months at 80 per cent., repayable on September 25; in fact, it was not repaid until October 8.

In addition to this 100*l.* on June 22, which may be treated as a renewal of the February loan, Spero borrowed on July 5 another 100*l.* repayable in three months at 80 per cent. This is the second sum claimed, as it was not repaid in October. Meanwhile he dropped into arrear with his instalments on the January loan; the instalment due on October 13 was not paid until October 19; the instalment due on November 13 was not paid until November 27; and the instalment due on December 13 had not been paid when, on December 27, he borrowed 100*l.* for three months at 80 per cent. This was the third transaction. The plaintiffs' writs were issued for 84*l.* 18*s.* on the January transaction, 152*l.* 4*s.* 7*d.* on the transaction of July 5, and 121*l.* 0*s.* 10*d.* on that of December 27.

Before the coming into effect of the Act of 1927, the Court under the Act of 1900 might reopen a money-lending transaction if it was satisfied that the interest or charges were excessive and the transaction harsh and unconscionable, or otherwise such that a Court of equity would give relief. The Court of equity would set aside, not remould, the transaction; but under the Act of 1900 the Court might remould it, and relieve the borrower of such sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court having regard to the risk and all the circumstances might adjudge to be reasonable. The Act gave no guide in the shape of a maximum rate of interest, but left the Court to "weigh each case upon its own merits" and do what was fair: per Lord Loreburn L.C. in *Samuel* v. *Newbold*. (1)

(1) [1906] A. C. 461, 467.

The Act of 1927, by s. 10, provided that if the rate of interest exceeded 48 per cent. per annum the Court should, unless the contrary is proved, presume that the interest is excessive and that the transaction is harsh and unconscionable. In my opinion, the effect of this provision is that, whereas before the Act of 1927 the borrower had to prove the rate of interest excessive and the transaction harsh and unconscionable in order to reopen the transaction, now since the Act of 1927, if the rate of interest is over 48 per cent., to save the transaction from being reopened, the money-lender has to prove circumstances which show that the rate is not excessive and the transaction not harsh and unconscionable. In other words, at a point in the scale of interest, fixed by Parliament at 48 per cent., the burden of proving facts which condemn or justify the transaction, shifts from the borrower to the money-lender. There are these minor results: (1.) That interest below 48 per cent. is not in itself and without more evidence adduced by the borrower, excessive; (2.) that interest over 48 per cent. may not be excessive, if the money-lender proves other facts justifying it.

In the present case the interest is over 48 per cent., and the money-lenders therefore have to give evidence to prove the rate of interest not excessive, and the transaction not harsh and unconscionable. They prove: (1.) That the borrower was a business man of forty, borrowing to provide working capital for a speculative business, speculative in the sense that success may depend on being able to hold an objet d'art till a purchaser can be found who wants it; (2.) that the borrower can give no security, only his personal promise to repay; (3.) that two of the loans are for short terms, when the rate of interest per annum is deceptive. To pay sixpence for the loan of a pound for a week does not sound harsh and unconscionable, but it is at the rate of 130 per cent. per annum. In the two last loans 20*l.* is to be paid for the loan of 100*l.* for three months; it is not paid in advance, but there is a promise to pay it three months hence, with no security; (4.) that there is no evidence of any of the circumstances hitherto relied on as proving harshness or unconscionableness—such as misstatements by the money-lender, weakness or lack of understanding on the part of the borrower or undue pressure.

I have carefully considered the judgment of Channell J. in a very similar case in *Carringtons, Ld.* v. *Smith* (1), and so entirely agree with it that I do not propose to repeat his views in my own words. The plaintiffs have satisfied me that I ought not to find a rate of interest excessive which a man of full understanding and in full possession of the facts was for his own business purposes content to pay, and that there was nothing harsh or unconscionable in the money-lender's treatment of the borrower. On this point, which involves the merits of the case, I agree with Rowlatt J. and am against the appellant.

The second point arises on s. 6 of the Act of 1927, and is, as Sir Patrick Hastings for the appellant earnestly and repeatedly impressed on us, entirely without merits. If, however, it is good in law he is entitled to raise it. Sect. 6, for the protection of the borrower, provides that no contract for the repayment of money, or any security for the performance of the contract shall be enforceable unless a note or memorandum of the contract be signed personally by the borrower before the money was lent, or the security was given, and unless a copy of the contract be sent to the borrower within seven days of the making of the contract. On each of the three loans, a note of the contract was signed before the money was lent, and was sent to the borrower within seven days of the making of the contract. In each case the note of the contract spoke of the loan being "on the security of a promissory note." It was alleged that the terms of the promissory note differed from those of the contract, and therefore the contract and promissory note were unenforceable.

If I understood the argument correctly, the two variances were: (1.) The note of the contract described the lenders as of 84 Jermyn Street, which would involve a liability of the borrower to find his creditor at 84 Jermyn Street to pay him. The promissory note promised to pay at 84 Jermyn

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(1) [1906] 1 K. B. 79.

Street, which, by s. 87, sub-s. 1, of the Bills of Exchange Act, 1882, required presentment there. But you cannot present to a man at a named place whose duty it is to come and pay at that place, and who does not come. I am of opinion there is nothing in this point, but I refer to the question of two documents for a loan later. (2.) It was said on the first loan that the note of the contract was for payment of 200*l.* and 60*l.* per cent. interest by consecutive monthly instalments of 20*l.* each, the first payable on February 13 and the balance on March 13. Such a contract, a loan for thirteen months, would need thirteen consecutive instalments; that is to say, 260*l.*, and a balance to discharge it. The promissory note said so, but it was said the contract ought to have said "thirteen" and did not. This difference is too trivial to notice. However, in *Gaskell, Ld.* v. *Askwith* (1) both the trial judge and the Court of Appeal were troubled whether the note or memorandum could be in two documents, and the present case has raised the question of the relation of the note of the contract to the security. It seems clear in s. 6 that the Legislature, while requiring a copy of the contract to be signed, has not required a copy of the security to be sent to the borrower, and it may need consideration whether if there is a more onerous term in the security than in the contract, the note of the contract may not be incomplete. I am disposed to think that where the contract contemplates a promissory note as security and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the contract does not set out the terms of the promissory note will not invalidate the contract. It may be otherwise if the security contains an onerous term not in the contract. I reserve, however, any final decision on this question, which does not seem to me to arise in the present case. I think oral evidence may be given to connect the promissory note signed with the memorandum, but s. 6 does not seem to treat the security as part of the memorandum: see per Thesiger L.J. in *Long* v. *Millar*. (2)

In my opinion the appeal should be dismissed with costs.

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(1) (1929) 45 Times L. R. 566.

(2) (1879) 4 C. P. D. 450.

GREER L.J. The plaintiffs, who are money-lenders, in these consolidated actions claim from the defendant moneys payable under three promissory notes: (1.) 84*l.* 18*s.* on a promissory note for 200*l.* dated January 13, 1928; (2.) 152*l.* 4*s.* 7*d.* due under a promissory note for 100*l.* dated July 5, 1928, and (3.) 121*l.* 0*s.* 10*d.* due under a promissory note for 100*l.* dated December 27, 1928. The promissory notes were in all material respects in the same form, except that the first was payable by monthly instalments, the second and third being payable three months after date. Each of the notes was made payable to the Reading Trust, Ld., or order at their office, 84 Jermyn Street, London.

By s. 87 of the Bills of Exchange Act, 1882, presentation at the address named was necessary in order to make the defendant liable on the note, but the defendant does not rely upon this as in itself, apart from the Moneylenders Act, a defence to the action on the notes. Sir Patrick Hastings for the appealing defendant admitted in the course of his argument that presentation for payment might be, and in fact had been, waived in the present case. He relied on the section for another purpose, that is to say, he relied on it in support of an argument based on s. 6 of the Moneylenders Act, 1927. His argument was that a presentation for payment was one of the terms of the contract of loan which was not stated in the memorandum signed by the defendant, and therefore he was relieved from liability by the terms of the said section of the Moneylenders Act. If this argument is correct, it defeats the whole of the plaintiffs' claim. But the appellant also relied on another contention which, if well founded, would have the effect of reducing the plaintiffs' claim. Rowlatt J., who tried the case, decided both points in favour of the plaintiffs. Neither point is free from difficulty, but I have come to the conclusion that the decision of Rowlatt J. was right and ought to be affirmed.

I deal first of all with the point made on s. 6 of the Moneylenders Act. The section is in the following words: [The Lord Justice read s. 6, sub-ss. 1 and 2, and proceeded :] The words of the section draw a clear distinction between a contract

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by a borrower for the payment of money lent, and the security or securities which he may give in relation thereto. It requires, first, a note or memorandum of the contract to be made and signed by the borrower, and secondly, that it should be so signed before the money was lent, or before the security was given; it requires, in the third place, that a copy of the memorandum shall be delivered or sent to the borrower within seven days of the making of the contract, and fourthly, it requires that the note or memorandum shall contain all the terms of the contract.

It was argued for the appellant that one of the terms of the contract of loan was that the promissory note should be presented for payment, that, as the memorandum of the contract omitted this term, it was not a sufficient memorandum within the section, and that therefore the contract was not enforceable. The memorandum in relation to the loan of January 13, 1928, was in the following terms: [The Lord Justice read the memorandum and continued:] It was proved that it was signed by the defendant before the money was lent, and before the promissory note was signed. The signature of the defendant, in my judgment, admits that the memorandum is a memorandum of the contract between the plaintiffs and the defendant, and it is evidence that the terms of the contract were those which are stated in the memorandum. It is true that the memorandum states that one of the terms of the contract of loan was that it was to be secured by a promissory note and not otherwise. It does not state what were the terms of the promissory note, but in my judgment parol evidence was admissible to identify the kind of promissory note referred to, and it was satisfactorily proved that the form of the promissory note was in existence, though unsigned, at the time the memorandum was signed. Once the form of the promissory note is identified, it can, in my judgment, be treated as part of the memorandum of contract, and the memorandum can then be read as if it contained the words, "on the security of a promissory note in the following form." The words of s. 6 are that without such a note no contract of loan shall be enforceable. They are

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analogous to the words of the Statute of Frauds, and the Sale of Goods Act, 1893. It has been decided in cases under the Statute of Frauds that parol evidence is admissible to identify a document referred to in the document signed by the party to be charged: see ss. 538–9 of Fry on Specific Performance, and p. 276 of Benjamin on Sale, 6th ed., and the cases there cited. For example, in *Long* v. *Millar* (1), it was held that a receipt for a deposit of 31*l.* on the purchase of three plots of land could be proved by oral evidence to refer to and incorporate a written memorandum of the contract of purchase, signed by the purchaser referring to the deposit, so as to satisfy the Statute of Frauds. Following the same line of reasoning, I think that if a memorandum of a contract of loan states that the loan is granted on the security of a promissory note, it may be proved by oral evidence that at the time of the loan there was in existence a form of promissory note ready for signature and that, when this evidence is given, the Court can read the two documents together as a complete memorandum of the contract of loan. If, for the reasons I have stated, the memorandum is in itself sufficient, this is a complete answer to the argument put forward on behalf of the appellant based on s. 6, because it cannot be disputed that the copy delivered to the defendant in each case contained a reference to a promissory note which was identified by the evidence, and it is not in dispute that an exact copy of the memorandum was given to the appellant after he signed the memorandum and the promissory note. The same result will be arrived at if, as I think we may, we construe the words, "a promissory note," as meaning a note promising to pay the Reading Trust at their address each instalment at its due date.

The other contention of the appellant only goes to the amount of the claim on each of the bills. By s. 1 of the Moneylenders Act, 1900, if there is evidence which satisfies the Court that the interest charged is excessive and the transaction is harsh and unconscionable, the Court may reopen the transaction and relieve the person sued from any

(1) 4 C. P. D. 450.

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payment in excess of the sum adjudged by the Court to be fairly due in respect of principal, interest, and charges, and substitute such a sum in respect of such principal, interest, and charges as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable. This section is now to be construed in the light of s. 10 of the Moneylenders Act, 1927, whereby it is enacted that if the interest charged is more than 48 per cent. the Court shall, unless the contrary be proved, presume that the interest charged is excessive, and that the transaction is harsh and unconscionable. In the present case the interest on the January loan was at the rate of 60 per cent. and on the other two loans at the rate of 80 per cent. Therefore, until the contrary is proved, the Court is required to presume that the interest was excessive, and that the transaction was harsh and unconscionable. But it is still open to the money-lender to show that under all the circumstances of the case the amount charged was not excessive, and the transaction was not harsh and unconscionable. The effect of s. 10 of the Act of 1927 is to shift the onus of proof. Subject to this the question remains the same and is to be decided on the same considerations as it was before the last named Act. In order to invalidate the transaction the Court has to decide on the whole of the circumstances, not merely whether the interest was excessive, but whether in addition to the interest being excessive, the transaction was harsh and unconscionable: see the judgments of the Court of Appeal in *In re a Debtor*. (1) As Cozens-Hardy L.J. says (2): "The Court must, in my opinion, be satisfied that the rate of interest charged is excessive, or that the other charges for expenses, &c., are excessive, and that in either case the transaction is harsh and unconscionable"; but he points out that the interest charged may in itself be so excessive as to show that the transaction is harsh and unconscionable. In the present case it was proved that the defendant had for some years, since he started business, been borrowing money from money-lenders in order to carry on his business, that from time to time he

(1) [1903] 1 K. B. 705.

(2) [1903] 1 K. B. 711.

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was a few days late in his payments, that at certain times he only met the instalments due by fresh borrowing, that he started his business without capital, that he was not in a position to give security, except by promissory notes, that he bought stock on credit, that he had an overdraft at the bank, that his business was that of a dealer in antiques, and at times he made large profits when he found customers who took a fancy to the antiques which he had bought, that while the January loan was current he had to borrow further money in February, June, and July, that no deceit was practised on him by the plaintiffs, and that he understood perfectly the obligations he was undertaking. All these matters were, in my judgment, relevant to the question whether the transaction was harsh and unconscionable. The judgment of Channell J. in *Carringtons, Ld.* v. *Smith* (1) contains a convincing statement of the considerations that ought to influence the Court in coming to a conclusion on the question whether a loan transaction be harsh and unconscionable. Those considerations are applicable at the present day notwithstanding that in a case where the interest exceeds 48 per cent. the burden of proof has been shifted. The learned judge laid special stress on the fact that the borrower thoroughly understood the transaction, and, knowing all the facts much better than the Court could possibly do, had been quite willing to pay the interest asked, as one of the circumstances to be taken into account in deciding whether the transaction was harsh and unconscionable. He also points to the fact that there was no misrepresentation by the money-lenders, and no taking advantage of the ignorance or the necessity of the borrower. All these circumstances were present in the case under appeal.

In my judgment Rowlatt J. rightly came to the conclusion that the plaintiffs had discharged the onus put on them of proving that none of the money-lending transactions with which the action before him was concerned were harsh and unconscionable, and the appeal must be dismissed with costs.

(1) [1906] 1 K. B. 79.

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Reading Trust, Ld. v. Spero. Spero v. Reading Trust, Ld.

Slesser L.J. This is a consolidated action brought upon a number of promissory notes signed by the defendant on January 13, July 5, December 27, 1928, for the sums of 84*l*. 18*s*., 152*l*. 4*s*. 7*d*., and 121*l*. 0*s*. 10*d*.; the notes being for 200*l*., 100*l*. and 100*l*. respectively.

The defence and counterclaim, so far as it is relevant to this appeal, raises two answers to the claim based upon s. 6 and upon s. 10 of the Moneylenders Act, 1927. It is pleaded by the defendant that the plaintiffs are registered money-lenders, and the transactions, the subject matter of the action, are money-lending transactions and form part of a series of money-lending transactions that have taken place between the plaintiffs and the defendant. First, as respects s. 6 of the Moneylenders Act, 1927, it is pleaded that the plaintiffs did not deliver or send to the defendant within seven days of the making of the alleged promissory notes a note or memorandum in accordance with s. 6 of the Moneylenders Act, 1927, by reason whereof the defendant says that the alleged promissory notes are not and neither of them is enforceable. And it is also pleaded that the amounts charged with interest, bonus and premiums are excessive and the said transactions are harsh and unconscionable and are transactions in respect whereof a Court of equity would give relief.

I propose to deal in the first place with the defence which depends upon s. 6 of the Moneylenders Act, 1927. This section, which imports a new obligation upon money-lenders with respect to the form of their contracts, is in the following terms: [The Lord Justice read s. 6, sub-ss. 1 and 2, and proceeded:] From these provisions it appears that no contract for the repayment by a borrower of money lent to him or of interest on money so lent or of security given by the borrower is enforceable unless certain conditions are complied with; the first of which is that a note or memorandum in writing of the contract be made and signed personally by the borrower which note, it is provided, by sub-s. 2, must contain all the terms of the contract. Secondly, a copy of the note or memorandum must be delivered or sent

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to the borrower within seven days of the making of the contract, and, thirdly, the note or memorandum must be signed by the borrower before the money was lent or the security given as the case may be. It is first necessary in this case to consider with some care what was the contract—a matter not free from some obscurity. The action is brought upon promissory notes and the defence, so far as regards s. 6, is that the plaintiffs did not deliver to the defendant within seven days of the said alleged promissory notes a note or memorandum in accordance with the section. The section must be construed strictly, as inaccuracy, which has caused no deception and is due merely to a clerical error, may render the contract unenforceable: *Gaskell, Ld.* v. *Askwith.* (1).

It appears, from the evidence in the case, that on each date on the same day, in compliance with s. 6, before the security, the promissory note, was signed, another document called a note or memorandum of contract for a loan was signed by the defendant—in the document of January 13, it is thus stated: "This note or memorandum is signed before the principal sum is advanced and before the security stated above is taken." In addition in the note or memorandum of January 13, there appears above the signature of the borrower, the following: "I acknowledge having received a true copy of this memorandum of contract," which, if true, would go to satisfy another condition of s. 6. As regards all the later notes or memoranda, it appears from the evidence that between the end of December, 1927, and January 13, 1928, Mr. Lipton, the managing director of the plaintiff company, saw the borrower several times and that the agreement arrived at as a result of negotiations was a contract of loan for advances on the security of a promissory note; moreover the note or memorandum which is signed by the borrower states that the money advanced was on the security of a promissory note. Although slightly differing in language, the subsequent notes or memoranda have provisions to the like effect and were also stated by the borrower to be memoranda of the respective contracts of loan. The note is,

(1) 45 Times L. R. 566.

"I have read this note or memorandum, of which I acknowledge I have received a true copy, which is signed before the principal sum is advanced and before the security stated above is given." The first of such notes of January 13, after setting out substantially similar conditions of loan and repayment to those contained in the promissory notes ends with these words: "I agree the above rate of interest to be a fair rate for the risk taken by you in advancing me the said sum of 200*l.* on the security of a promissory note only."

The promissory note which is here sued upon contains a provision to pay the Reading Trust, Ld., or order at 84 Jermyn Street, London, S.W., and, it is argued that, as one of the terms of the contract was that the promissory note should be presented at the office of the lender, the memorandum which only speaks generally of a "promissory note" omits an essential item—namely, the place of presentment; that because the reference to the promissory note in the memorandum of the same day does not recite that payment must be made at 84 Jermyn Street, it is not a note or memorandum containing all the terms of the contract within the meaning of s. 6, sub-s. 2, of the 1927 Act. The only material difference between the note or memorandum on the one hand and the promissory note on the other is that while the note or memorandum says that the "sum of 200*l.* is advanced on the security of a promissory note," it omits to say that the promise to pay was to pay at 84 Jermyn Street, London, which in fact is the place of presentment mentioned in the promissory note itself, and it is said that this is a fundamental omission because, by s. 87 of the Bills of Exchange Act, 1882, where a promissory note is in the body of it made payable at a particular place it must be presented for payment at that place in order to make the promisor liable. This argument, however, fails to give sufficient weight to the general rule of law that where no certain place is appointed the debtor is bound to find the creditor and tender him the money: see Leake on Contracts, 7th ed., p. 640. Prima facie, in commercial transactions, when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on business: *Rein* v. *Stein* (1), per Kay L.J.; *The Eider* (2), and, as to companies, in particular Mathew L.J. in *Duval* v. *Gans* (3) said (I omit certain matters not relevant to this case): "Where . . . . no place of payment is specified, it appears to me that, in the absence of anything to the contrary, the intention may be inferred that the payment should be made to the company where its office is situated. A limited company is not for this purpose on the same footing as an ordinary individual, who may be itinerant, and at any moment change his residence." See also per Stephen J. in *Robey* v. *Snaefell Mining Co.* (4), where he says: "Some authority . . . . is to be found in Coke upon Littleton to the effect that the obligor of a bond must go to the obligee in order to pay it." The passage referred to by the learned judge appears to be that on p. 210A, s. 340, third book, in which it is said, speaking of feoffment in mortgage, "he (the feoffor) is bound to seek the feoffee if he be then in any other place within the realm." In a later passage Lord Coke applies this rule to a man bound to pay at a place certain; the obligor cannot tender the money at the place when he will, for then the obligee would be bound to perpetual attendance: p. 211A. If the creditor being abroad prevents payment or tender being made, the debtor is excused: Sheppard's Touchstone, at p. 378. In this case it is sufficient to point out that the address of the Reading Trust, Ld., is mentioned as 84 Jermyn Street, London, in the note or memorandum and, as a consequence, even if it may be here considered that the note or memorandum in writing of the contract requires that the terms of the promissory note shall be fully stated, I am of opinion that, having regard to the fact that the address of the plaintiff company is stated in the memorandum, and to the rule of law that the "debtor is bound to find the creditor if he is within the realm," the words "on the security of a promissory note" mean a note promising to pay the Reading Trust at 84 Jermyn Street,

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(1) [1892] 1 Q. B. 753, 758.
(2) [1893] P. 119, 131.
(3) [1904] 2 K. B. 685, 692.
(4) (1887) 20 Q. B. D. 152, 154.

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which is to be the place of presentment as fully as if those words had been stated in the note or memorandum. The requirements of the section have therefore in my view here been satisfied and the defence based upon s. 6 must fail.

I pass to the defence based upon s. 10 of the 1927 Act. This section amends s. 1 of the Act of 1900, by raising a presumption that where the interest charged exceeds 48 per cent. per annum or the corresponding rate in respect of any other period, the Court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable. This section, in my judgment, does no more than shift the burden of proving that the interest charged is not excessive and that the transaction is not harsh and unconscionable to the lender, and the sole question on this point is whether the lender in the circumstances of this case has discharged this burden of proof. The learned judge has not in terms referred to s. 10 of the Act of 1927, but he has found "that it is not a case of a man who is in difficulties who cannot escape and advantage is taken of him, and that, therefore, it is harsh and unconscionable. The terms were very stiff and his business was extraordinarily speculative, but he was making large profits—this was a true matter of business embarked upon by a gentleman who struck me as being—of course he must be—a man of great intelligence . . . . carrying on a high class business, simply finding that his business is so speculative that he cannot get finance from the banks, but so profitable in his skilful hands that he can make profits which can pay 60 or 80 per cent. interest."

This Court is loath to disturb a finding on evidence by a judge who has seen the witnesses and observed their demeanour in the box, and, on this finding the case appears to me to be one where a judge may properly find that it has been proved by the lender that the transaction was one which did not call for relief. The policy of the Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon

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its own merits: per Lord Loreburn L.C. in *Samuel* v *Newbold.* (1) In *Carringtons, Ld.* v. *Smith* (2) Channell J. mentions as one of the factors which ought to be considered the free and voluntary agreement of a competent and intelligent borrower to pay the interest asked, and again, speaking of the transactions in that case, he says: "That price"—that is the consideration for the loan—"the borrower, without being in any really pressing necessity, immediately agreed to give without any bargaining or remonstrance, merely asking one question and getting a satisfactory answer." These conditions have been found to exist by Rowlatt J. in the present case, and I therefore have come to the conclusion that in this case the lender has discharged the onus cast upon him by s. 10 of the 1927 Act to show that the interest charged was not excessive and that the transaction was not harsh and unconscionable.

For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Guedalla, Jacobson & Spyer.*
Solicitors for respondents: *Woolfe & Woolfe.*

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(1) [1906] A. C. 461, 467.

(2) [1906] 1 K. B. 79, 93.

W. H. G.

THE KING *v.* COMPTROLLER-GENERAL OF PATENTS.

1929
Dec. 17, 18.

Ex parte ENGL AND OTHERS.

Patent—Indorsement—"Licences of right"—Cancellation of Indorsement—Application by Patentees—Advertisement—Opposition—Power of Comptroller-General to hear Parties—Patents and Designs Acts, 1907 (7 *Edw.* 7, *c.* 29) *and* 1919 (9 *&* 10 *Geo.* 5, *c.* 80), *s.* 24, *sub-s.* 5—*Patents Rules,* 1920 (*St. R. & O.*, 1920, *No.* 338), *Rules* 73–75.

Where a patentee applies, under s. 24, sub-s. 5, of the Patents and Designs Acts, 1907 and 1919, for the cancellation of the indorsement, "licences of right," on a patent, the Comptroller-General of Patents may advertise the application, indicating the procedure to be followed by any person wishing to oppose it, may require the filing of statements and evidence by the patentee and an opponent, and may hear the parties before deciding the application.

Rules 73, 74 and 75 of the Patents Rules, 1920, are intra vires and valid.

RULE NISI for a writ of mandamus.

The applicants, Josef Engl, Joseph Massole, Hans Voght, and Tri-Ergon A.G. (a Swiss company), were joint grantees and/or proprietors of certain letters patent. On various dates in 1927 and July, 1928, they applied to the Comptroller-General of Patents for the said letters patent to be indorsed "licences of right" under s. 24 of the Patents and Designs Acts, 1907 and 1919, and in due course all the letters patent were so indorsed.

On October 26, 27 and 30, 1928, the applicants applied for the indorsements to be cancelled under s. 24, sub-s. 5, of the Acts. (1) In November, 1928, the Comptroller-General, purporting to act under rr. 73, 74 and 75 of the Patents Rules, 1920 (1), advertised in the Illustrated Official Journal (Patents), the London Gazette, and the Board of Trade Journal the receipt of the applications to cancel the indorsements, the advertisements stating that any person who wished to oppose any of the applications should give notice at the Patent Office. On November 22, 1928, one Albert Edward Chapman applied to the applicant, Engl, for a licence under one of the letters patent, and on December 6, 1928, Chapman entered notice of opposition to the cancellation of the indorsement on that letters patent. On December 1, 1928, the Gramophone Co., Ld., applied to all the applicants for licences under their letters patent, and entered notices of opposition to the cancellation of the indorsements on those letters patent.

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(1) By s. 24, sub-s. 5, of the Patents and Designs Acts, 1907 and 1919: "If at any time it appears that in the case of a patent so indorsed [i.e., indorsed, at the request of the patentee, with the words 'licences of right'] there is no existing licence the Comptroller may, if he thinks fit, on the application of the patentee . . . . after due notice cancel the indorsement . . . ."

Rule 73 of the Patents Rules, 1920, provides that an application by a patentee for the cancellation of an indorsement shall be made on a certain form, and that it shall be advertised by the Comptroller.

Rule 74 provides that within one month from the first advertisement any person may give notice of opposition on filing certain documents.

On February 1, 1929, the applicants' solicitors wrote to the Comptroller-General alleging that rr. 73–75 of the Patents Rules, 1920, were ultra vires as not being in accordance with s. 24, sub-s. 5, of the Patents and Designs Acts, 1907 and 1919, that no notice of the opposition to the applications for the cancellation of the indorsements should have been given, and that no opposition to the applications could be entertained. The Comptroller-General was asked to adjudicate on the applications without entertaining the oppositions which had been lodged. On February 6, 1929, the Comptroller-General replied that, in view of the fact that formal notices of opposition had been given in the prescribed manner, he was not prepared to determine the question whether the indorsements should be cancelled until he had heard and decided the oppositions. (1)

On March 7, 1929, the applicants were granted a rule nisi calling on the Comptroller-General to show cause why a writ

Rule 75 provides that, on notice of opposition being given, the provisions of Rules 43 to 49 (which deal with the filing of a counter statement by the patentee, the filing of evidence on both sides, and the hearing of the parties by the Comptroller) shall apply mutatis mutandis to the further proceedings on the application.

(1) In an affidavit sworn by him in opposition to the rule, the Comptroller-General stated that the reason why it was thought desirable that indorsements on letters patent should not be cancelled without opposition being heard was that any person who held an interest in a patent or a licence thereunder, or who might otherwise be affected, ought to be heard in opposition. The register of patents alone would not give notice of the rights of such a person.

of mandamus should not issue commanding him to consider and determine, pursuant to the statutes in that behalf, the applications for cancellation of the indorsements, the grounds of the rule being that he had refused to determine the applications pursuant to s. 24, sub-s. 5, of the Patents and Designs Acts, 1907 and 1919, but had advertised the applications and invited oppositions thereto and required the applicants to comply with rr. 73–75 of the Patents Rules, 1920, which, it was alleged, were ultra vires.

Sir William Jowitt A.-G. and *Stafford Crossman* showing cause against the rule. This rule should be discharged, as the Comptroller-General acted in accordance with the Patents and Designs Acts, 1907 and 1919, and the Patents Rules, 1920, made thereunder. Those Rules were made under s. 86, sub-s. 1, of the Act of 1907, which provides that "the Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of this Act . . . . (*h*) generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the Comptroller, or of the Board of Trade." Sub-s. 2 provides that "general rules shall whilst in force be of the same effect as if they were contained in this Act." The terms of that enactment show that rr. 73–75 are clearly intra vires as "regulating the business of the Patent Office" and also regulating matters placed by the Acts "under the direction or control of the Comptroller." Having been laid before the Houses of Parliament for forty days the Rules, by sub-s. 2 of s. 86, have the same effect as if they were contained in the Act. Furthermore, the Rules, apart from that provision, are valid because they are reasonable for fulfilling the provisions laid down in the Acts. Sect. 24, sub-s. 1, of the Acts is obligatory. It imposes on the Comptroller a duty to indorse a patent if the patentee so requests. But sub-s. 5 is merely permissive and, quite apart from the Patents Rules, 1920, the Comptroller-General had power, in exercising his discretion, to adopt the course which he did.

If the contention of the applicants is correct, the owner of a patent could get his patent indorsed and then, if the patent is successful and applications for licences are received, he could get the indorsement cancelled, without any opposition being heard, thereby putting himself in a better position to enforce terms on persons applying for licences than he otherwise would be. By s. 71 of the Patents and Designs Acts, 1907 and 1919, assignments of patents, transmissions, mortgages and licences must be registered, but there is nothing in the Acts which affects the title of the persons interested under such assignments, etc., if registration does not take place, save that by s. 71, sub-s. 4, no document which has not been registered in accordance with the provisions of sub-ss. 1 and 2 is admissible in evidence in proof of the title to letters patent or to any interest therein unless the Court otherwise directs. Consequently, the rights of persons whose names do not appear upon the register may be affected by an application to the Comptroller-General to cancel an indorsement under s. 24 of the Patents and Designs Acts, 1907 and 1919. It is only in accordance with reason and justice that those persons should be given notice of the application and an opportunity to state their case.

Hon. Stafford Cripps K.C. and *Trevor Watson* for the Gramophone Co., Ld., who were interveners. These interveners applied to the owners of the patents for licences which have not been granted and therefore they have rights to which attention should be given. Sub-s. 5 of s. 24 provides that "the Comptroller may, if he thinks fit . . . . after due notice cancel the indorsement." The words "after due notice" point to the fact that these interveners are entitled to be heard in opposition to the application to cancel the indorsement.

Hon. H. Fletcher Moulton for Albert Edward Chapman, who also intervened.

Moritz K.C. and *K. E. Shelley* in support of the rule. Any provision in the Patents Rules, 1920, for opposition to applications for the cancellation of the indorsement, "licences of right," is ultra vires. Although s. 86, sub-s. 2, of the Patents and Designs Act, 1907, provides that general rules made by the Board of Trade shall be of the same effect as if they were contained in the Act, those rules can only establish new machinery. They cannot confer new rights. They cannot, for instance, authorize the Comptroller to hold a judicial inquiry where there is no appeal from his decision if such a thing is not contemplated by the Acts. The Rules must, therefore, fall within the section to which they refer. The power of the Comptroller-General under s. 24, sub-s. 5, is purely ministerial. He must base his decision wholly on the information provided by the records of the Patent Office. Under the Patents and Designs Acts, 1907 and 1919, the Comptroller-General acquires a dual capacity. He is put in an administrative position and he also has judicial functions. The Acts prescribe (see ss. 7, 11, 21, 26 and even in s. 24, sub-s. 3) that, whenever the Comptroller-General acts in a judicial capacity, there is an appeal from his decision. There is, however, no appeal from his decision on an application by the owner of a patent to cancel an indorsement under s. 24, sub-s. 5, and that omission is rendered particularly significant by the provision of a right of appeal in s. 24, sub-s. 3. The Comptroller ought to examine the application and see whether there is anything in the Patent Office bearing upon the point and then come to his decision. He would then be acting in an administrative capacity. On the other hand, if he advertises for opposition to the application, as was done in the present case, and so brings in opponents and then holds an inquiry at the Patent Office, before coming to his decision, he is acting in a judicial capacity and holding an inquiry for which no provision has been made.

LORD HEWART C.J. The ground on which the applicants seek this rule is that the Comptroller-General of Patents has refused to consider and determine according to s. 24, sub-s. 5, of the Patents and Designs Acts, 1907 and 1919, the applications made by the applicants for the cancellation of the indorsements, "licences of right," on the patents of which they are grantees or proprietors. The applicants complain that the Comptroller-General advertised the applications and gave an opportunity for oppositions against the applications to be entered and, in other respects, followed the provisions of rr. 73–75 of the Patents Rules, 1920. Those rules, the applicants say, are contrary to the provisions of the Acts and are, therefore, ultra vires, and, in acting in pursuance of them, the Comptroller-General has in effect declined to act according to the provisions of the Acts.

Sect. 86, sub-s. 1, of the Acts provides that the Board of Trade "may make such general rules . . . . as they think expedient . . . . (*h*) generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the Comptroller . . . ." Sub-s. 2 of the section provides that "general Rules shall whilst in force be of the same effect as if they were contained in this Act." I deliberately pass over sub-s. 2, because, in my opinion, no question arises with respect to it. Rules 73–75 were made in pretended conformity, at any rate, with s. 86, sub-s. 1 (*h*).

Under s. 24, sub-s. 5, of the Acts, the Comptroller-General may cancel the indorsement, "licences of right," on a patent, if there is no existing licence and if he thinks fit to do so after having given due notice. To enable him to act under the statute with full knowledge and in proper circumstances, rr. 73–75 of the Patents Rules prescribe a certain form of procedure. But it is said that, in making those provisions for informing the mind of the Comptroller-General, the Board of Trade did something which was repugnant to the general scheme and purpose of the Acts. Indeed, it seemed to be said that it was repugnant to natural justice. I confess that the argument seems to be almost paradoxical. Here is an application which is, in form, at any rate, for a mandamus directed to the Comptroller-General to hear and determine these applications, but, in fact, it is urged that he should be prevented from hearing more than one side. The Rules are said to offend in that they afford actual or potential opponents, interested persons, an opportunity of being heard. When it is suggested that Rules directed to that end are in some way repugnant to natural justice, a proposition is advanced which would seem to be directly contrary to the truth.

In the earlier part of s. 24, where crucial matters connected with the indorsement of a patent with the words "licences of right" are dealt with, the Comptroller-General is not given a discretion whether he shall or shall not act. A duty to act is placed upon him. Sub-s. 2 specifies the appropriate machinery. It is true that that machinery is not repeated in terms in sub-s. 5. In substance it is indicated in rr. 73–75. But, had there been no Rules at all, it is difficult to say that anything that is contemplated in rr. 73–75 would not have been within the discretion of the Comptroller-General when acting under s. 24, sub-s. 5. The allegation that these Rules are ultra vires the Act when they follow closely the model set by the precise provisions of the Act in consimili casu seems to me to be quite unsustainable.

It has been argued that, if the Comptroller-General had been intended by the Act, as distinct from the Rules, to enter on an inquiry of the nature which these Rules contemplate, the Act would have provided a right of appeal from his decision. But, admittedly, these Rules follow the model set in s. 24, sub-s. 2, with reference to s. 24, sub-s. 1, where the Comptroller-General is dealing with matters of no less importance and interests no less comprehensive than those affected by s. 24, sub-s. 5, and in those matters his decision is not subject to appeal. I confess that I do not follow the argument that, if it had been intended that the Comptroller-General should embark under s. 24, sub-s. 5, on the kind of inquiry which he is compelled to embark on under sub-s. 1, the Act would have provided a right of appeal, when, ex hypothesi, there is no right of appeal against his decisions under the preceding part of the section.

It is also argued that the words in sub-s. 5, "if at any time it appears that in the case of a patent so endorsed there is no existing licence," mean "if at any time it appears from an examination of the Register of Patents that there is no existing licence." But, if that were what the words mean, it would have been easy for the Legislature to say so. It is contended that the Comptroller-General may inform his mind by reference to the records of his office, but that he must not make inquiries, or otherwise ascertain the facts. I see no such limitation indicated by s. 24, sub-s. 5. A great responsibility is placed on the Comptroller-General by that sub-section, a responsibility which may profoundly affect interests of large dimensions. He could not have been blamed if, apart from the Rules, he had, before making up his mind, in fairness, adopted the methods which these Rules prescribe.

In my opinion, there is no ground for saying that these Rules are in any sense ultra vires, and this rule ought to be discharged.

AVORY J. I am of the same opinion. Unless it can be established that rr. 73–75 of the Patents Rules, 1920, are ultra vires, it is obvious that they apply to this case and that they not only give to the Comptroller-General power to hear opposition to applications for the cancellation of indorsements, but that they also confer on the opponents the right to be heard. In substance, the argument that these Rules are ultra vires is that, as the Act provides no appeal against a decision of the Comptroller-General on an application under s. 24, sub-s. 5, the Act cannot have intended that he should have any jurisdiction to hear such an application on its merits instead of adjudicating purely ex parte. I confess that I am quite unable to appreciate that argument. Reading s. 24 as a whole, and particularly sub-s. 1 (*b*) (iii.), which provides that in settling the terms of a licence, the Comptroller-General shall "endeavour to secure equality of advantage among the several licensees, and for this purpose may, on due cause being shown, reduce the royalties or other payments accruing to the patentee under any licence previously granted: provided that, in considering the question of equality of advantage, the Comptroller shall take into account any work done or outlay incurred by any previous licensee with a view to testing the commercial value of the invention or to securing the working thereof on a commercial scale in the United Kingdom," it seems to me to be impossible to contend that the Comptroller-General has not only a right but also a duty to hear any person in opposition to an application under s. 24, sub-s. 5, quite apart from the provisions of rr. 73–75.

TALBOT J. I am of the same opinion. Sect. 24, sub-s. 5, of these Acts obviously gives a discretion to the Comptroller-General, whether it be called a judicial discretion or not, when he is acting under it. If the Comptroller-General thinks fit, he may refuse an application under the sub-section without giving any reasons. An applicant under the sub-section has no right except to have his application considered. The only ground on which the present rule could be made absolute would be that it appeared that the Comptroller-General had refused to consider and to determine applications under the sub-section pursuant to the provisions of the Act of Parliament. The Comptroller-General states that he has not refused to consider the applications at all, but that, on the contrary, he will consider them in his own way and he maintains that he can invoke for his guidance the observations of any persons who conceive that their interests would be injuriously affected by the cancellation of the indorsements.

Why is he not entitled to do that ? It seems to me that, quite apart from any rules, any officer who is armed with discretionary powers of this kind may inform himself with regard to the correct exercise of them by any just means that are available. It happens in the present case that the way in which the Comptroller-General thinks it right to act is the way of which the Board of Trade also approve and it cannot be considered to be any the worse for that. I think that it has been overlooked that the Comptroller-General has followed the course which he has followed, not only because it is prescribed by the Board of Trade, but also because, as he says in his affidavit, he thinks that it is in itself a desirable procedure. I utterly fail to see any reason, either in law or in common sense, for saying that the Comptroller-General is not entitled to act as he has acted if he thinks fit to do so.

It has also been argued that rr. 73–75 of the Patents Rules, 1920, are ultra vires, but how can it be said that s. 86, sub-s. 1, of the Acts, which empowers the Board of Trade to "make such general rules . . . . as they think expedient . . . . (*h*) generally for regulating the business of the Patent Office, and all things by this Act placed under the direction and control of the Comptroller-General," does not cover rules relating to applications to the Comptroller-General under s. 24, sub-s. 5? Nor do I understand how it can be suggested that there is anything in that sub-section, or elsewhere in the Act, which is in any way contravened by rr. 73–75.

It was said that the fact that no appeal is given against a decision of the Comptroller-General under s. 24, sub-s. 5, really concludes the matter. That cannot mean anything so absurd as that the fact that there is no appeal makes it the more improper for him to take all possible means to ensure a correct decision being arrived at. The argument must rather be taken to be that it is contrary to the policy of the Acts that the Comptroller-General should be allowed to adjudicate on any matter without being subject to an appeal and that, therefore, when no right of appeal is provided, there can be no adjudication. That that argument is hopeless becomes apparent when s. 24, sub-s. 1 (*b*), is considered. That paragraph, which deals with the settlement by the Comptroller-General of the terms which, in default of agreement, are to be imposed on the parties where a licence is claimed as of right, refers to problems which may involve large sums of money and would, in almost every case, be more difficult, complex and important than the matters dealt with by sub-s. 5, but the decision of the Comptroller-General is absolutely final. That seems to dispose of the notion that the Comptroller-General must not adjudicate on any matter unless there is an appeal against his decision. Whether an appeal in such circumstances is expedient may be a very proper matter for Parliament to consider, but, as the Act stands, I can see no ground on which this rule could be made absolute.

Rule discharged.

Solicitor showing cause: *Solicitor to the Board of Trade.*
Solicitors in support: *Woodham Smith & Borradaile.*
Solicitors for the Gramophone Company, Ld.: *Broad & Son.*
Solicitors for A. E. Chapman: *E. F. Turner & Sons.*

G. F. L. B.

ANKIN *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

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Dec. 19.

[1929. A. 271.]

Practice—Discovery of Documents—Production—Privilege—Public Interest—Statement by Minister of the Crown—Documents obtained at Request of Solicitor—Regulation of Railways Act, 1871 (34 *&* 35 *Vict. c.* 78), *s.* 6.

In an action to recover damages for personal injury incurred in an accident on the defendants' railway, an order having been made for discovery of documents, the defendants in an affidavit stated that they had in their possession a copy of a report made by them to the Ministry of Transport under s. 6 of the Regulation of Railways Act, 1871. They objected to produce this document on the ground that it was a copy of a confidential document made in discharge of their duty to the Crown and that it was privileged inasmuch as it could not be disclosed without injury to the public interest. The deponent also produced and verified a copy of a letter written by him to the Minister of Transport, and the reply thereto of the Minister to the effect that reports made in pursuance of s. 6 of the Act aforesaid were furnished for his own information and guidance and that it was his practice in the public interest to decline any request to inspect these reports or to obtain copies of them:—

Held, that it was the practice of the Court to accept the statement of a Minister of the Crown upon the question whether production of a document would be contrary to the public interest; and consequently that the document in question was privileged from production.

Privilege was also claimed for other documents on the ground that they were "confidential communications at the instance and request and for the use of the defendants' solicitor between the officials of the defendant company and between those officials and third persons after this action was threatened or anticipated for the purpose of obtaining for and furnishing to the defendants' solicitor evidence and information as to the evidence which will be obtained and otherwise for the use of the said solicitor to enable him to defend this action and to advise the defendants."

Held, that these documents were also privileged.

Southwark and Vauxhall Water Co. v. *Quick* (1878) 3 Q. B. D. 315 followed.

APPEALS from two orders of Finlay J. in Chambers on appeal from orders relating to discovery and inspection of documents made by Master Jelf in the following circumstances.

The plaintiff brought an action against the defendants for damages for personal injuries sustained by him through the alleged negligence of the defendants. His case was that on November 17, 1928, he travelled as a passenger on the defendants' railway from Waltham Cross to Clapton; that when the train arrived at Clapton he saw a lamp bearing the name of the station and that being thereby led to believe that he might safely alight from the train he attempted to do so and fell upon a sloping approach which was lower than the platform made visible by the lamp, and injured himself severely. The defendants denied negligence, and alleged contributory negligence on the part of the plaintiff.

In an affidavit made on behalf of the defendants in compliance with an order for discovery of documents James McLaren, the secretary to the defendants, stated that the defendants had in their possession or power the documents set forth in the first and second parts of the schedule to the affidavit; that the defendants objected to produce the documents set forth in the second part of the schedule on the ground that they consisted solely of (*a*) professional communications of a confidential character between the defendants and their solicitor for the purpose of obtaining or giving legal advice and assistance, and, in the words of the affidavit, of "(*b*) confidential communications at the instance and request and for the use of the defendants' solicitor between the officials of the defendant company and between those officials and third persons after this action was threatened or anticipated for the purpose of obtaining for and furnishing to the defendants' solicitor evidence and information as to the evidence which will be obtained and otherwise for the use of the said solicitor to enable him to defend this action and to advise the defendants." The documents referred to in the second part of the schedule under the headings (*a*) and (*b*) above were described as "tied up in a bundle and numbered 1 to 49 inclusive."

In answer to this affidavit Mr. W. A. Evill, a member of the firm of solicitors representing the plaintiff, made an affidavit stating that in his belief the defendants had in their possession or power reports in writing made by porters, drivers, station-masters or other employees to other officers of the defendants and not made to or at the instance of the defendants' solicitors or in contemplation of legal proceedings, but being reports made in the ordinary course of duty and for the purpose of keeping the defendants informed of the conduct of their business. In para. 6 of his affidavit the deponent stated as the grounds of his belief: "It is the statutory duty of the defendants to give notice by the earliest practicable post to the Board of Trade"—meaning the Ministry of Transport—"when any accident attended with personal injury to any person whomsoever takes place in the course of working their railway." He proceeded to state that counsel for the defendants had contended that all reports made after any such accident were privileged and therefore he, the deponent, believed that reports of this kind had been included in the bundle of documents numbered 1 to 49 mentioned in the affidavit of James McLaren. He claimed to have production of those documents for his inspection on behalf of the plaintiff.

In reply the defendants filed two affidavits, one by their secretary who took the objection that the affidavit on behalf of the plaintiff was contentious and irregular in that it sought to contradict the statement in the deponent's former affidavit that the documents numbered 1 to 49 consisted of confidential communications made at the instance and request of the defendants' solicitor and for his use. He further stated that it was a matter of common experience that in case of an accident like that in the present case legal proceedings are always to be anticipated and are generally threatened, and that it is therefore necessary and expedient that reports should be procured as materials upon which professional advice may be taken in reference to such proceedings, and that such reports are therefore obtained at the instance and request and for the use of the defendants' legal advisers and that the documents above referred to were of that character and made for that purpose.

The second affidavit in reply was by the defendants' solicitor who stated as follows: "In addition to the documents referred to in the aforesaid first affidavit"—the first affidavit of James McLaren—"the defendants have in their possession or power a copy . . . . of a statutory report made to the

Minister of Transport in compliance with the Regulation of Railways Act, 1871, s. 6 (1), the Railway Employment (Prevention of Accidents) Act, 1900, and the Ministry of Transport Act, 1919, s. 2. . . . . The defendants object to produce the aforesaid copy document on the ground that it is a copy of a confidential document made in the discharge of the defendants' duty to the Crown and that the same is privileged inasmuch as it cannot be disclosed without infringing the policy of the said Acts of Parliament and without injury to the public interest." He went on to produce and verify the copy of a letter written by him to the Minister of Transport dated November 5, 1929, and the Minister's reply thereto dated November 11, 1929. These documents were in the forms following:—

"Sir, Accident at Clapton Station on November 17, 1928. In connection with the above accident an action is pending in the High Court which Mr. John Charles Ankin has brought against this Company in which he claims damages on the ground that the accident was caused by the negligence of the Company or its servants. My clients inform me that a return of the accident was made in the form prescribed by s. 6 of the Regulation of Railways Act, 1871, on December 3, 1928. The plaintiff's solicitors are now seeking to obtain an order for the production of a copy of this return by means of discovery. It is the view of my clients that a return of this nature made under statutory requirements is in the nature of a confidential document for the use of the Minister only, and in order to enable me to deal with the matter before the Master in Chambers, I shall be much obliged if you will inform me whether you concur in this view."

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(1) Regulation of Railways Act, 1871, s. 6: "Where in or about any railway or any of the works or buildings connected with such railway, or any building or place, whether open or enclosed, occupied by the company working such railway, any of the following accidents takes place in the course of working any railway; (that is to say,)

(1.) Any accident attended with loss of life or personal injury to any person whomsoever . . . .

the company working such railway . . . . shall send notice of such accident and of the loss of life or personal injury (if any) occasioned thereby to the Board of Trade" [now the Ministry of Transport, by the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 2] . . . . "Every company who fail to comply with the provisions of this section shall be liable for each offence to a penalty not exceeding twenty pounds."

The answer was as follows: "Sir, In reply to your letter of November 5 on the subject of legal proceedings in connection with an accident that occurred at Clapton Station on November 17, 1928, I am directed by the Minister of Transport to state that in his view the notices of accidents furnished to him by Railway Companies in pursuance of s. 6 of the Regulation of Railways Act, 1871, are furnished for his own information and guidance in the performance of his duties, and that their utility in this respect might be prejudiced if they were compiled by Railway Companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the Railway Companies concerned. In these circumstances it is the practice of the Minister to decline, in the public interest, to comply with any request which he may receive for permission to inspect or to obtain copies of such notices." . . . .

On November 22, 1929, the plaintiff took out summonses for inspection of the documents numbered 1 to 49 and for production of the copy of the report mentioned in the affidavit of the defendants' solicitor. Master Jelf refused to make an order for inspection of the documents, but ordered the defendants to produce the copy of the report. On appeal Finlay J. affirmed the first order, but reversed the second.

The plaintiff appealed from both the orders of Finlay J.

Hilbery K.C. and *Rewcastle* for the appellant.

du Parcq K.C. and *Cope Morgan* for the respondents.

[The following cases were cited: Upon the question whether the report made by the respondents to the Ministry of Transport was privileged: *Woolley* v. *North London Ry. Co.* (1); *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (2)

[SLESSER L.J. referred to *Smith* v. *East India Co.* (3)]: Upon the question of the privilege claimed for the other documents:

(1) (1869) L. R. 4 C. P. 602. (2) [1916] 1 K. B. 822.
(3) (1841) 1 Ph. 50.

Cook v. *North Metropolitan Tramway Co.* (1); *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (2); *Adam Steamship Co.* v. *London Assurance Corporation* (3); *The Hopper No.* 13 (4); *The City of Baroda.* (5)]

SCRUTTON L.J. The question in this appeal arises upon an application for the discovery of certain documents. The first point argued relates to a report which the Railway Company is by statute required to make to the Ministry of Transport. The Company have a copy of that report in their possession. They ought to have included it in their original affidavit of documents and then to have stated why they declined to produce it or why they claimed privilege for it. In a subsequent affidavit they did claim privilege for it on the ground that they had written to the Minister of Transport stating that the appellant was applying to the Court for an order that a copy of the report should be produced for his inspection, and asking the Minister whether he concurred in their view that the report was in the nature of a confidential document for his use only; and that they had received a reply that "the notices of accidents furnished to the Minister of Transport by railway companies under s. 6 of the Regulation of Railways Act, 1871, are furnished for his own information and guidance in the performance of his duties, and that their utility in this respect might be prejudiced if they were compiled . . . . with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the railway companies concerned. In these circumstances," the letter stated, "it is the practice of the Minister to decline, in the public interest, to comply with any request which he may receive for permission to inspect or obtain copies of such notices." I take this affidavit to mean that the respondents decline to produce these notices, and that the reason for their refusal is that it is contrary to the public interest that documents of this class should be shown to anybody outside the Ministry of Transport without the consent of the Minister. It is the practice of the English Courts to accept the statement of one of His Majesty's Ministers that production of a particular document would be against the public interest, even though the Court may doubt whether any harm would be done by producing it. I have been informed on very high authority that the practice in Scotland is different; that there the judge looks at the document and orders it to be produced if he does not agree with the Minister's reasons for considering its production to be against the public interest. No harm seems to have resulted from this practice. But that is not the law in England. Here if the Minister says that it would be against the public interest to produce a particular document the Court accepts his statement upon his responsibility. In my opinion, if it is contrary to the public interest to produce an original document, it must equally be contrary to the public interest to produce a copy which the maker of the document has kept for his own information. *Woolley* v. *North London Ry. Co.* (1) was cited by the appellant, but in that case the railway company made no claim to protect the document on the ground that it was against the public interest to produce it. The distinction between a single document and a class of documents as the subject of privilege is dealt with in the passage cited by my brother Slesser from Lord Lyndhurst's judgment in *Smith* v. *East India Co.* (2) where the Lord Chancellor held that the protection of the public interest might and did cover a whole class of documents. It follows that if the production of the class is contrary to the public interest it is not necessary to consider each individual document to ascertain the exact degree to which the public interest will be prejudiced by its production. For these reasons I agree with the decision of Finlay J. upon the first appeal.

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(1) (1889) 6 Times L. R. 22.

(2) [1913] 3 K. B. 850.

(3) [1914] 3 K. B. 1256.

(4) [1925] P. 52.

(5) (1926) 17 Asp. Mar. Law Cas. 27.

With regard to the second appeal, the original affidavit of discovery claimed protection on the ground of privilege for documents of three classes. Classes (*a*) and (*b*) contain forty-nine documents and the appellant applied that all of them should be produced and inspected. Class (*a*) consists of "Professional communications of a confidential character between the defendants and their solicitor for the purpose of obtaining or giving legal advice and assistance." Those are obviously privileged and ought not to have been included in the claim for inspection. The more important matter is Class (*b*): "Confidential communications at the instance and request and for the use of the defendants' solicitor between the officials of the defendant Company and between those officials and third parties after this action was threatened or anticipated for the purpose of obtaining for and furnishing to the defendants' solicitor evidence and information as to the evidence which will be obtained and otherwise for the use of the said solicitor to enable him to defend this action." That is a statement of two facts: First, that the communications were obtained at the instance and request of the defendants' solicitor; if so the claim to have inspection of them is hopeless; secondly, that they were obtained for the use of the defendants' solicitor; again, if so, the claim to have inspection must fail.

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(1) L. R. 4 C. P. 602.

(2) 1 Ph. 50.

The appellant's advisers then filed a controversial affidavit. This was most irregular. It has long been settled that a deponent stating grounds on which he claims privilege is not to be met by an opposing affidavit either contradicting him or cross-examining him with a view of showing that what he has stated is untrue. The other party can only look at the affidavit itself. If it is ambiguously or too ingeniously worded, so that its meaning is obscure, he may take the objection that the claim for privilege is not sufficient and may obtain a more precise statement of the facts. And there is also an available procedure by which he can challenge his opponent to deny that he has or has had in his possession a document or class of documents. But that relates to discovery and not to privilege.

In answer to this contentious and irregular affidavit the respondents filed a second affidavit, which, after very properly submitting that the contentious affidavit should not be

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admitted, proceeded to argue that, in order to claim privilege from production of a document, it was not necessary to state that the document was prepared solely for the information and use of the legal advisers of the party claiming to protect it. That is quite right. Then the affidavit goes on to state a fact which has been recognized by Hamilton L.J. in *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Ry. Co.* (1)—namely, that " It is a matter of experience and common knowledge that proceedings are to be anticipated and are generally threatened or pending in the event of any such accident as that alleged by the plaintiff herein, and it is necessary and expedient that reports should be procured as materials upon which professional advice may be taken "—then it goes on to give that fact as the reason why the defendants' solicitor has requested that the documents should be obtained—" and such reports are therefore obtained at the instance and request and for the use of the defendants' legal advisers, and," it continues, " the documents referred to in paragraph 2 (*b*) are of the character and for the purposes aforesaid." I do not take that to mean " I say those documents were obtained at the request of the solicitor, not because he really asked for them, but because it was desirable that he should get them." That reason would not support a statement that they were obtained at the request of the solicitor. The affidavit must be taken to mean what it says when it states that the documents were obtained at the request of the solicitor although, it may be, not solely in compliance with that request but from other motives also. That being the effect of the affidavit, it is clear from *Anderson* v. *Bank of British Columbia* (2) and *Southwark and Vauxhall Water Co.* v. *Quick* (3) that the claim for privilege is satisfactorily made and cannot be controverted by affidavit. In the former case a claim was impending against the London office of a bank, which had a branch abroad, in respect of dealings by the foreign branch. The London manager called upon the branch manager to furnish

(1) [1913] 3 K. B. 850, 859.
(2) (1876) 2 Ch. D. 644.
(3) 3 Q. B. D. 315.

the fullest particulars of the whole transactions, in response to which the branch manager wrote a report. It was held that this report was not privileged. It was not obtained for the solicitor but was merely sent to him after the claim was made. For a similar reason, if a shipowner gets a report from his captain and afterwards, when a claim arises, sends the report on to his solicitor, that report is not privileged. In *Southwark and Vauxhall Water Co.* v. *Quick* (1), on the other hand, the documents in question were prepared in the first instance to be laid before the company's solicitor for the purpose of obtaining his advice. It was held that these documents were privileged. If in addition the documents are prepared because the solicitor has requested that, when an accident happens, such documents shall always be prepared for his use, the case becomes clearer. The principle applicable to the production of this class of documents has been established by those two cases and well recognized ever since. In my judgment both appeals should be dismissed.

SLESSER L.J. I am of the same opinion. The first appeal, that in which the learned judge reversed the decision of the Master, turns on the question of privilege in relation to a report made by the defendant Company to the Ministry of Transport under s. 6 of the Regulation of Railways Act, 1871, an accident attended with personal injury having taken place in or about their railway. The Act contemplates that after receiving the report the Ministry may, if they think fit, direct an enquiry to be held into the cause of the accident to which the report refers. In the present case a report was duly sent as required by the statute. The plaintiff's solicitors now desire to obtain production of a copy of the report. In reply to a letter from the defendants' solicitor the Minister of Transport, through a Mr. Rowntree, has stated that it is the practice of the Ministry to decline, in the public interest, to comply with any request which they may receive for permission to inspect, or to obtain copies of, such notices.

(1) 3 Q. B. D. 315.

In these circumstances it appears to me that the learned Master misconceived the effect of *Woolley* v. *North London Ry. Co.* (1), in which, it is true, the Court allowed inspection of a letter written by the defendants' general manager to the secretary of the Board of Trade in pursuance of s. 3 of the Railway Regulation Act, 1840 (3 & 4 Vict. c. 97), which contains a provision similar to that in the Act of 1871, requiring a notice to be sent to the Board of Trade in the event of an accident. But in *Woolley's* case (1) the point now taken, that the disclosure of the document would, in the opinion of the Minister of the Crown, be contrary to the public interest, was not before the Court at all, and there was no evidence that the Board of Trade at that time did object in the public interest, as the Ministry of Transport, their successors, have objected, to the production of these reports. The learned judge seems to have felt that *Woolley's* case (1) raised a difficulty in the way of deciding, as he did, that the report in this case was privileged, and it may be that during the discussion in Chambers he had not sufficiently in mind the fact that the ground on which privilege is claimed in this case was not relied on in *Woolley's* case. (1)

With regard to the reason given by the Minister of Transport for concluding that production of the report would be contrary to the public interest, in my view of the authorities he was not bound to give any reasons for his conclusion. In the present case he has condescended to do so. He has said that these reports "are furnished for his own information and guidance in the performance of his duties and that their utility in this respect might be prejudiced if they were compiled by railway companies with the knowledge that any information contained in them might be used by individual members of the public for the purpose of prosecuting their private claims against the railway companies concerned." The validity of those reasons seems to be recognized by Lord Lyndhurst L.C. in *Smith* v. *East India Co.* (2) where, speaking of a great corporation largely controlled and regulated by statute and performing public services and in

(1) L. R. 4 C. P. 602.

(2) 1 Ph. 50, 55.

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that respect not unlike a railway company, the Lord Chancellor said: "It is quite obvious that public policy requires, and looking to the Act of Parliament, it is quite clear that the Legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests." Therefore I think that in this case, both on its particular merits and on the general principle, the Court will not interfere, the Minister having said production of the report would be to the injury of the public interest.

With regard to the second appeal I agree with what has been said by Scrutton L.J. and have nothing to add.

Appeals dismissed.

Solicitors for appellant: *Mills, Lockyer, Church & Evill.*
Solicitor for respondents: *I. B. Pritchard.*

W. H. G.

ATTORNEY-GENERAL *v.* FARRELL AND ANOTHER.

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Nov. 4, 6.

Revenue—Estate Duty—Estate Tail—Discretionary Trust—Reservation of Interest—"Disposition" — Disentailing Deed — Customs and Inland Revenue Act, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*)—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*c*); *s.* 3; *s.* 7, *sub-s.* 1 (*a*); *s.* 22, *sub-s.* 2 (*b*).

The defendants were trustees of a deed of resettlement dated January 17, 1896, under which A. and his mother (in exercise of their powers under a disentailing deed previously executed by them) appointed the property to trustees upon trust for the mother for life and after her death on trusts for management, and after payment of expenses to apply the net profits for the benefit of A., his wife and children or remoter issue during the life of A. for the benefit of any one or more to the exclusion of the others as the trustees should in their absolute and uncontrolled discretion think proper, and after the death of A. on trust for his sons successively in tail male.

The mother died in 1925, and estate duty was paid on 42,176*l.*, being the value of the property subject to the resettlement. A. died a bachelor in 1926. On the death of the mother the second son was the person entitled to the first equitable estate for life in the settled property expectant on the death of A. The trustees on the death of the mother entered into possession of the rents and profits, and paid a sum of 50*l.* per month to A., and the balance after payment of expenses to the second son.

An information was filed by the Crown claiming that the property, subject to the trusts of resettlement, was property passing on the death of A. within the Finance Act, 1894, s. 1, or must be deemed to have passed under s. 2, sub-s. 1 (*c*), of the Act:—

Held, that the disentailing deed was a disposition taking effect out of the interest of A.

Held, also, that the discretionary trust of which A. was one of the possible objects was a reservation by him of an interest within the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*c*), as re-enacted in the Finance Act, 1894, s. 2, sub-s. 1 (*c*).

Attorney-General v. *Heywood* (1887) 19 Q. B. D. 326 followed on this point.

Held, also, that the resettlement made by A. by virtue of s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, was a disposition deemed to have been made by him for all purposes of Part I. of that Act, including the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (*c*), as re-enacted in the Finance Act, 1894, s. 2, sub-s. 1 (*c*).

INFORMATION filed by the Attorney-General on behalf of His Majesty.

By will dated September 21, 1865, and in the events which happened, certain funds directed to be applied in the purchase of real estate in Ireland, were, at the date of the next mentioned disentailing deed (September 27, 1894), vested in trustees in fee simple upon trust to pay the income to Lady Mowbray and Stourton (herein called "the Baroness") for life with remainder to her son (referred to throughout these proceedings as "the deceased") in tail male with remainders over. The Baroness had power to charge the premises with sums not exceeding 5000*l.* for portions for her younger children.

By a disentailing deed dated September 27, 1894, the Baroness and the deceased conveyed all the freehold hereditaments comprised in the will, or purchased thereunder, to the trustees of the will, upon the trusts thereof free from the estate tail and all remainders taking effect thereafter to such uses as the Baroness and the deceased should by deed jointly appoint.

By a resettlement dated September 27, 1894, the Baroness and the deceased in exercise of their powers under the disentailing deed appointed the premises upon trust to pay to the deceased the yearly sum of 800*l.* determinable on bankruptcy, and subject thereto the trust estate was to be held on trust for such persons as the Baroness and the deceased should by deed jointly appoint and in default of appointment in trust for the Baroness for life with remainder in trust for the deceased for life with remainder in trust for his first and other sons successively in tail male. [Here followed the usual limitations in a settlement of property in tail male.] By the same resettlement the Baroness and the deceased in exercise of their powers under the disentailing deed, after appointments in favour of the deceased and of younger children, declared that the trustees were to hold the residue of the trust funds as the Baroness and the deceased should by deed jointly appoint with further directions in default of appointment, so that the capital moneys should be impressed with a trust for the purchase of freehold hereditaments and should devolve as real estate.

By a resettlement dated January 17, 1896, between the Baroness and the deceased and the trustees of the will, the

Baroness and the deceased appointed that in consideration of the payment of 7000*l.* to be raised out of the trust funds the deceased should release the trust estate from the payment of the above annuity of 800*l.* and that the trustees should pay to the deceased for his life an annuity of 300*l.* with a discretion to pay a further annuity of 300*l.*, and subject to this and certain other payments should hold the trust estate on trust for the Baroness for life as declared in the will and resettlement dated September 27, 1894, and after the death of the Baroness upon trust to take the profits of the trust estate and manage the premises during the life of the deceased on trust to apply the net profits after expenses and costs of management for the benefit of the deceased, his wife and children or remoter issue in existence and the other persons entitled in remainder for the benefit of any one or more to the exclusion of the others in their absolute and uncontrolled discretion and after the death of the deceased on trust for the sons of the deceased successively in tail male. [Then followed the usual limitations in case of a settlement in tail with remainders over.] The Baroness died on November 26, 1925, and estate duty was paid at the appropriate rate in respect of real estate to the value of 42,176*l.*, being the property subject to the trusts of the two resettlements.

The deceased was adjudicated a bankrupt on December 31, 1903, and died a bachelor on November 14, 1926. At the death of the Baroness, her second son was the person entitled to the first vested equitable estate for life in the settled property expectant on the death of the deceased and such equitable estate for life fell into possession on the death of the deceased.

On the death of the Baroness, the defendants, as trustees of the resettlements, entered into possession of the rents and profits of the settled property and until the death of the deceased, in exercise of their discretion under the resettlement of January 17, 1896, paid to him monthly the sum of 50*l.*, free of income tax, and paid the surplus to the second son.

At the death of the deceased the property subject to the trusts of the resettlement, included stocks which were the

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proceeds of sale of real estate situate in the Irish Free State, to the value of 31,204*l*.

The informant claimed that these stocks, representing the proceeds of sale of real estate, passed on the death of the deceased within s. 1 of the Finance Act, 1894, or alternatively must be deemed to have so passed under s. 2, sub-s. 1 (*c*), of that Act, on the ground that the disentailing deed and resettlement constituted a settlement by the deceased under which the property passed and whereby an interest for life was reserved to the settlor, and that estate duty was payable on the death of the deceased on the principal value of the property.

The informant asked for a declaration that on the death of the deceased, estate duty at the appropriate rate became payable on the principal value of the property as passing or deemed to have passed on the death of the deceased under s. 1; or s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

J. H. Stamp for the Crown. The disentailing deed here was a settlement which took effect "out of the interest of the deceased." The persons taking in succession took the estate from the deceased and the benefit was derived from his estate. This is clear from *Charlton* v. *Attorney-General* (1) and the cases there followed. The power conferred on the trustees of the settlement to pay income to the deceased here was discretionary only: but this was sufficient to constitute a reservation of interest within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, as re-enacted in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which extended the application of s. 38 to real property: *Attorney-General* v. *Heywood* (2) governs the present case on this point.

The fact that the payments made by the trustees to the deceased were voluntary does not prevent their being the subject of charge and constituting an "interest" for the purpose of s. 2, sub-s. 1 (*c*). The judgment of Lord Loreburn in *Drummond* v. *Collins* (3) is authority for this, although that was a case dealing with income tax.

(1) (1879) 4 App. Cas. 427.
(2) 19 Q. B. D. 326.
(3) [1915] A. C. 1011, 1016.

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Wilfrid Greene K.C., *Raymond Needham K.C.* and *H. H. C. Graham* for the defendants. The Customs and Inland Revenue Act, 1881, s. 38, imposed "Probate and Account Duty" at death in respect of personal estate only. Probate duty was not payable upon a life interest or on the death of a tenant in tail. Account duty was established in order to prevent the evasion of probate duty by gifts in anticipation of death. It was not payable upon the termination of a limited interest. Under the first settlement here the Baroness took a life interest and the deceased took a life interest subject to the joint power of appointment. In exchange for this the deceased took 7000*l.* in cash and a discretionary interest in the new settlement. The Customs and Inland Revenue Act only deals with property of which the settlor had the complete disposal. The disentailing deed here created the joint power of appointment in favour of the Baroness and the deceased; but the latter never had the fee simple, nor did he have the consent of the protector to the settlement.

The Finance Act, 1894, s. 22, sub-s. 2 (*b*), provides that "a disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required." But this section only relates to s. 7, sub-s. 1 (*a*), of the Act. It has nothing to do with dispositions made by the deceased. The words "taking effect out of his" (the deceased's) "interest" occur nowhere else in the Act except in s. 7, sub-s. 1 (*a*), and the definition in s. 22, sub-s. 2 (*b*), is solely to explain these words in s. 7, sub-s. 1 (*a*). No "account duty" can be payable where a tenant in tail has got rid of his interest, because no interest can in those circumstances belong to him at death.

The Finance Act, 1894, s. 2, sub-s. 1 (*c*), can have no application here, because the deceased settlor never had the fee simple in possession, so as to be in a position to settle it. He had a power of appointment only jointly with his mother. The decision in *Attorney-General* v. *Heywood* (1) is

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(1) 19 Q. B. D. 326.

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against us upon one part of the case, but the Court there ignored the real meaning of a discretionary trust. It is clear from the judgment of the Court of Appeal in *In re Coleman. Henry* v. *Strong* (1) and the declarations made in that case that a possible benefit from a discretionary trust confers no interest on the beneficiary.

Finally the circumstances here may amount to a purchase for full consideration, having regard to the 7000*l.* reserved by the deceased in exchange for his life interest: Finance Act, 1894, s. 3, sub-s. 1. If not full consideration, there was at least partial consideration for which allowance should be made as a deduction from the value of the property under s. 3, sub-s. 2.

J. H. Stamp in reply. The correspondence between the words in the Finance Act, 1894, s. 22, sub-s. 2 (*b*), and s. 7, sub-s. 1 (*a*), is accidental only. The fact that the settlor requires consent does not make it any the less his settlement.

Here a fee simple was created by the disentailing assurance and upon that trusts were grafted. The estate tail was thereby enlarged into a fee simple: *Charlton* v. *Attorney-General.* (2)

As to the Customs and Inland Revenue Act, 1881, s. 38, that section was extended by the Finance Act, 1894, s. 2, sub-s. 1 (*c*). Here the property was settled by the deceased, and if these dispositions have been effected by the settlements a liability to duty must arise.

Nov. 6. ROWLATT J. The Crown here claims estate duty on the ground that this disentailing deed is a disposition which takes effect out of the interest of the deceased and must be deemed to have been made by him whether the concurrence of any other person was or was not required. I feel no doubt on this point. The claim of the Crown is then advanced in two stages: (1.) that the resettlement made by the deceased by virtue of s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, is a settlement deemed to have been made by him for all purposes of Part I. of the Act, including s. 38,

(1) (1888) 39 Ch. Div. 443, 450.

(2) 4 App. Cas. 427.

sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, which section is to be treated as re-enacted by virtue of s. 2, sub-s. 1 (*c*), of the Act of 1894; and (2.) that the discretionary trust, of which the deceased was one of the possible objects, was a reservation to him of an interest within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, re-enacted in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and extended to real property.

As to the second of these two points the case appears to me to be concluded in favour of the Crown by the decision of the Court of King's Bench in *Attorney-General* v. *Heywood*. (1) I did not understand counsel for the defendants to contest that, although they challenged the decision and can develop their argument in the event of an appeal.

As regards the first point—namely, the effect of s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, Mr. Greene contended that the sub-section has no application to a case arising under s. 38, sub-s. 2 (*c*), of the Act of 1881. The word " disposition " does not occur in that sub-section of the Customs and Inland Revenue Act, 1881, and Mr. Greene argued that s. 22, sub-s. 2 (*b*), applies only to s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, where the word " disposition " is used.

I am not able to agree with this view. Sect. 22, sub-s. 2 (*b*), does not define what is meant in the specific section, but is of general application to this part of this Act, so as to prevent questions arising how a disposition by the deceased requiring the consent of another person is to be dealt with in legislation as to settlements made by him personally.

The main contention put forward by Mr. Greene was of a broader character, that s. 38, sub-s. 2 (*c*), of the Act of 1881 had no application to settlements by disentailing deed and resettlement. The section as enacted has reference to personal property in the full ownership of the deceased, which, but for the disposition, would be subject to probate duty, the taxation of property " passing on death " as introduced by the Act of 1894 being then outside the contemplation of the Legislature. He argues that the section on being

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(1) 19 Q. B. D. 326.

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transported to the Finance Act, 1894, by s. 2, sub-s. 1 (*c*), and applied to realty, should not have its scope extended so as to affect settlements which can be made for the convenience of a tenant for life and a tenant in tail in remainder.

Legislation applying a section of an existing Act to operate in a new Act and upon a subject for which it was not designed is unhappily familiar, but no authority was cited to me to the effect that a section so transported cannot have an operation with regard to the new subject-matter which its original subject-matter by its nature would not admit. I can see no justification for limiting s. 2, sub-s. 1 (*c*), of the Act of 1894 in this way so as to create artificially a gap in the Act. The object was to make realty liable to estate duty as much as personalty, which might escape duty by dispositions inter vivos. I do not see why a disposition by which a tenant in tail prevents himself from being at his death possessed of property should be on a different footing from a disposition by which an owner in fee simple produces the same effect.

In conclusion it was argued by Mr. Greene that the defendants were protected by s. 3 of the Act of 1894. But it is impossible to say that the property passed on the death of the deceased by reason only of a bona fide purchase from him. Assuming that there was such a "purchase" here the property would have equally "passed" on the death so as to bring it within the Finance Act, 1894.

For these reasons the Crown in my opinion is entitled to succeed.

Judgment for the Crown.

Solicitors for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the defendants: *Gustavus Thompson & Sons, for W. Roche & Sons, Dublin.*

F. P. F.

MANCHESTER SHIP CANAL COMPANY *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

1929
Dec. 17.

Factory Acts—Dangerous Process—Unloading Ship in Dock—Fencing or covering of Hatchways which have been used in Process, but which are not in use—Duty of Person carrying on Process—Extent of Duty—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 104—*Docks Regulations,* 1925, *dated March* 6, 1925 (*St. R. & O.*, 1925, *No.* 231), *Duties* (*d*), *Part IV., reg.* 34.

The Docks Regulations, 1925, which were made in pursuance of s. 79 of the Factory and Workshop Act, 1901, " in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock," etc., provided, by para. (*d*) of the " Duties," set out at the commencement of the Regulations, as follows: " It shall be the duty of every person who by himself, his agents, or workmen carries on the processes [The term "processes" was defined as meaning, "the processes above mentioned or any of them "], and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV. of these Regulations. Provided that while the processes are being carried on, it shall be the duty of the owner, master or officer in charge of a ship to comply with regulation 34, so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes."

Reg. 34, which was in Part IV. of the Regulations, provided: " (*a*) Where there is more than one hatchway, if any hatch of a hold exceeding five feet in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than two feet six inches in height, such hatch shall either be fenced to a height of three feet or be securely covered . . . ." :—

Held, that the duty of fencing or covering a hatch, in compliance with reg. 34, which was not in use but which had been used during the process of unloading a ship lay upon the person who by himself, his agents or workmen carried on the process of unloading, and not upon the owner, master or officer in charge of the ship.

Held, further, that for the purposes of the Factory and Workshop Act, 1901, the covering of a hatch which had been used for the purpose of unloading the ship was ancillary to the main work of unloading, and that the work of unloading was not completed till the hatch was covered.

Stuart v. *Nixon & Bruce* [1901] A. C. 79 applied and followed.

CASE stated by the chairman of the Court of quarter sessions for the County Palatine of Lancaster.

At a court of summary jurisdiction sitting at Strangeways, Manchester, an information was preferred by Anthony Herbert Gardner, solicitor, acting for and on behalf of the Director of Public Prosecutions, under the Factory and Workshop

Act, 1901, that the appellants, being persons who by themselves or by their agents or workmen were carrying on processes within the meaning of the Docks Regulations, 1925, made in pursuance of the Factory and Workshop Act, 1901, on the steamship *Manchester Citizen* then lying at the Sun Mills Berth, Trafford Wharf, Stretford, did unlawfully neglect to comply with No. 34 of the said Regulations, in that the shelter deck hatch of the hatchway No. 6 of the said steamship, being the hatch of a hold exceeding five feet in depth measured from the level of the deck in which the said hatch was situated to the bottom of the hold and being a hatch of which the coamings were less than 2 feet 6 inches in height, having been used for the said processes, but having ceased to be in use for the passage of goods, coal or other material, was neither fenced to a height of 3 feet nor securely covered contrary to s. 85 of the said Factory and Workshop Act, 1901, and on February 26, 1929, the said court of summary jurisdiction heard the information and determined the same and convicted the appellants of the said offence and fined them 5*l.*

The appellants appealed from that conviction to the Court of quarter sessions for the Hundred of Salford, and that Court on April 16, 1929, duly heard the appeal and dismissed the same with costs and confirmed the conviction.

The appellants, being dissatisfied with the dismissal of their appeal, applied to the Court of quarter sessions to state a case for the opinion of the High Court, and the justices accordingly stated the following case.

Upon the hearing of the appeal the following facts were admitted:—

On October 30, 1928, the steamship *Manchester Citizen* was lying at the Sun Mills Berth, Trafford Wharf, Stretford, and was loaded with grain. The steamship had six cargo holds and six hatchways, No. 1 hold being at the bow and No. 6 hold being at the stern. There were three decks on the steamship, of which three were above holds Nos. 1 to 5, and two above hold No. 6. The decks over hold No. 6 were known as the top deck and shelter deck respectively.

There was a hatch on the top deck to hold No. 6, and a considerable distance below that was the shelter deck in which there was another hatch to hold No. 6. The bottom of hold No. 6 was some 28 feet below this hatch in the shelter deck, and the coamings round this hatch on the shelter deck were only 6 inches in height.

Holds Nos. 1 to 5 were being unloaded by the Co-operative Wholesale Society, and hold No. 6 was being unloaded by the appellants.

The Co-operative Wholesale Society commenced unloading on October 29, 1928, and continued the unloading from about 8 A.M. on October 30, 1928. They were unloading hold No. 4 until about 3 P.M. on October 30, 1928, then hold No. 2 until about 3.30 P.M. on that day and then hold No. 5 until 5 P.M. on that day, at which time there was a break for tea. After tea from about 5.30 P.M. the Co-operative Wholesale Society continued to unload hold No. 1 until 10 P.M. on that day.

The appellants commenced to unload hold No. 6 about 8 A.M. on October 30, 1928. When they first went on the steamship on October 30, 1928, the hatch of hold No. 6 on the top deck was covered, but the hatch of that hold on the shelter deck was not covered, but was open. The appellants removed the hatch cover of hold No. 6 on the top deck, and put an elevator in hold No. 6 for the purpose of unloading.

The appellants unloaded the grain out of hold No. 6 until about 2.30 P.M. on October 30, 1928, by which time all the grain in that hold had been unloaded. They were then engaged until about 3.45 P.M. on October 30, 1928, in removing the elevator. They then replaced the cover of the hatch of hold No. 6 on the top deck and left the ship.

The appellants did not cover the hatch on the shelter deck of hold No. 6, or in any way fence this hatch.

The shelter deck in the vicinity of the hatch to hold No. 6 was made completely dark by the replacement of the cover of this hatch on the top deck.

Between 4.30 P.M. and 5 P.M. on October 30, 1928, a man fell into hold No. 6 and was killed.

On the part of the appellants it was contended :—

(*a*) that the facts did not disclose the offence of which the appellants were convicted ;

(*b*) that the conviction was erroneous and unjust ;

(*c*) that the Docks Regulations only applied to a person carrying on a process during the time that the process was being carried on by him ;

(*d*) that the appellants had ceased to carry on on the said ship any process when they removed their tackle and left the ship ;

(*e*) that it was not in the circumstances obligatory upon the appellants to fence or cover the said hatchway ;

(*f*) that the covering or fencing of the hatches was not a part of the process of unloading as defined by the Regulations.

On the part of the respondent it was contended :—

(*a*) that the conviction of the appellants was right ;

(*b*) that the hatch of hold No. 6 on the shelter deck of the steamship having been used by the appellants during the unloading of hold No. 6, but having ceased to be in use for the passage of goods, coal or other material ought to have been fenced to a height of 3 feet or securely covered by the appellants upon such cessation and before leaving the steamship ;

(*c*) that the process of unloading the hold No. 6 included the fencing of the hatch of hold No. 6 of the shelter deck of the steamship to a height of 3 feet or the covering of the hatch securely upon its ceasing to be in use for the passage of goods, coal or other material ;

(*d*) that the process of unloading hold No. 6 was not complete until the hatch of hold No. 6 of the shelter deck of the steamship was fenced to a height of 3 feet or securely covered.

The attention of the Court of quarter sessions was directed on behalf of the respondent to the decision in *Stuart* v. *Nixon & Bruce.* (1)

(1) [1901] A. C. 79.

The question for the opinion of the High Court was whether, upon the above statement of facts, the Court of quarter sessions came to a correct determination and decision in point of law.

Langton K.C. and *Lustgarten* for the appellants. This case arises under regulations made under the Factory and Workshop Act, 1901, s. 79, "in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour or canal." The contention of the appellants is that they are not the persons who have been guilty of an offence under those regulations. Reg. 34 (*a*), which is in Part IV. of the Docks Regulations, 1925, requires that "where there is more than one hatchway, if any hatch of a hold exceeeding five feet in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than two feet six inches in height, such hatch shall either be fenced to a height of three feet or be securely covered." There is a proviso that the Regulation "shall not apply (i.) during meal times or other short interruptions of work during the period of employment, (ii.) to trimming hatches which are not accessible to persons employed." Para. (*d*) of the "Duties" set out at the commencement of the Regulations provides that "it shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen and persons employed by him in the processes, to comply with Part IV. of these Regulations. The word "processes" is defined as meaning "the processes above mentioned or any of them." This refers back to the commencement of the Regulations, which sets out that the Secretary of State made the following Regulations "in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour or canal." Para. (*d*) of the "Duties" contains a proviso that "while the processes are being carried on, it shall be the duty of the owner, master or officer in charge of a ship to comply with regulation 34, so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes." What the appellants did was to leave the ship in the same condition as they found it. They replaced the cover on the hatch to hold No.6 on the top deck, but did not cover the hatch to hold No. 6 on the shelter deck, which was not covered when the appellants went on board the steamship. In so doing the appellants fulfilled the duties imposed upon them by the Regulations, which say nothing about the duty of putting back the covers on hatches when the unloading is finished. The obligation to comply with reg. 34 is only imposed while the processes of loading, unloading, etc., are being carried on. In the present case the process of unloading hold No. 6 had been completed when the accident happened, and therefore there was no obligation on the appellants to fence or cover the hatchway to hold No. 6. The Co-operative Wholesale Society were also engaged at the same time in discharging holds Nos. 1 to 5, and a duty lay upon them to provide for the safety of their employees. There is a statement in the case that "the shelter deck in the vicinity of the hatch to hold No. 6 was made completely dark by the replacement of the cover of this hatch on the top deck," but under reg. 12 of the Docks Regulations, 1925, a duty is imposed on the owner, master or officer of the ship to efficiently light the ship while the processes of loading and unloading are being carried on. The contention was put forward on behalf of the respondent that "the process of unloading hold No. 6 was not complete until the hatch of hold No. 6 of the shelter deck of the steamship was fenced to a height of three feet or securely covered." That contention however cannot be correct. It is true that the House of Lords held in *Stuart* v. *Nixon & Bruce* (1) that putting the covers on the hatches was part of the process of

(1) [1901] A. C. 79.

loading a ship, and that the process of loading was not complete until the operation of putting on the hatch covers was finished. The reason for that is that the hatch covers must be put on before a ship can safely proceed on her voyage. But that case is no authority for the proposition that in unloading a ship it is part of the process of unloading to put the covers on the hatches after all the cargo has been taken out of the hold. There is nothing in the Regulations requiring the covers to be placed on hatches after the unloading is finished.

Sir William Jowitt A.-G., *Giveen* and *W. Gorman* for the respondent. In considering the Factory and Workshop Act, 1901, and the Regulations made thereunder, it is a fallacy to think that the Act and the Regulations were designed to safeguard only those who are employed in the factory, it is clear that the Act and the Regulations were designed to safeguard not only those who are employed in the factory, but also those who are working on the premises, although not so employed. In considering the Docks Regulations, 1925, one must have regard to the primary object for which the Act was passed. Before those Regulations were made there had been previous regulations made in 1904 with regard to "the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour, or canal." Those Regulations were expressed to be made "for the protection of persons employed in the processes or in any of them." Further those Regulations did not contain the proviso to para. (*d*) of the "Duties" set out in the Docks Regulations, 1925. There were two cases decided under those earlier Regulations. The first was *Owner* v. *C. J. King & Sons, Ld.* (1), where the question turned upon the construction of reg. 19 of the Regulations of 1904, which is very similar in terms to reg. 34 of the Regulations of 1925, and Lord Hewart C.J. said (2) that the justices have found "that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry

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(1) (1922) 128 L. T. 307.

(2) (1922) 128 L. T. 309.

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out work; in other words, those hatchways which have been or are being used or are to be used by the particular persons employed by him or by his agents upon the carrying out of the process." In the second case, *Howlett* v. *Shaw, Savill and Albion Co., Ld.* (1), the Court of Appeal held that the Regulations of 1904, having regard to the language of the Regulation, only applied to protect those persons who were employed in "the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf or quay, and the processes of loading, unloading, and coaling any ship in any dock, harbour, or canal," and that therefore the Regulations did not apply to protect a joiner's labourer who was killed while working on the ship. In consequence of those decisions the Docks Regulations, 1925, were made, in which these matters were put right, the paragraph in the Regulations of 1904 setting out the persons for whose protection the Regulations were made was omitted in the Regulations of 1925, and further a proviso to para. (*d*) of the Duties was inserted in the Regulations of 1925, which was obviously framed on the language of the Lord Chief Justice in *Owner* v. *C. J. King & Sons, Ld.* (2) That proviso mentions "those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes," but it does not refer to those hatches which are not in use but which have been used. Therefore the duty to comply with reg. 34 as regards those hatches which are not in use but which have been used is not imposed on the owner, master or officer in charge of the ship. It is clear that there is an obligation to fence or cover the hatches that have been used. That obligation is imposed upon the appellants as the persons carrying on the process of unloading, and it is immaterial that a period of time has elapsed since the completion of the process, and that the appellants have left the ship. It is impossible to give effect to the argument of counsel for the appellants having regard to the decision of the House of Lords in *Stuart* v. *Nixon & Bruce.* (3) Lord Halsbury L.C.

(1) (1924) 19 Ll. L. Rep. 176.
(2) 128 L. T. 307, 309.
(3) [1901] A. C. 79, 89, 91.

drew no distinction in that case between the operations of loading and unloading. He said: "The loading or unloading must be treated as a whole transaction." He had "no doubt that it was part of the duty of the person loading the vessel to put on the hatchways just as much as to put in the bags in any particular part of the hold" and later that "this transaction—I was going to say it was ancillary to the main transaction of loading or unloading, but I think that would be an inadequate statement of it, because I think it is part of the loading and unloading." If the process of loading is not considered to be complete unless the hatch covers are put on, there is no reason why, for the purposes of the Factory Act, the process of unloading should be considered to be completed unless the hatch covers are put on. If the safety of the persons on the premises is any criterion it is just as reasonable to consider the putting on of hatch covers part of the process of unloading as it is part of the process of loading.

Langton K.C. in reply. Neither of the cases cited by the Attorney-General is an authority for the proposition for which he contends. In *Owner* v. *C. J. King & Sons, Ld.* (1), the hold, down which the workman fell, was actually being worked by the crew at the time of the accident, and therefore there was no reason why the stevedores should be held responsible. There are observations in the judgments of Bankes and Scrutton L.JJ. in *Howlett* v. *Shaw, Savill & Albion Co., Ld.* (2), which support the appellants' contention that it is necessary to look at the particular moment of time when the accident happened to see upon whom the obligation falls. Bankes L.J. said: "Yet at the time of the accident the unloading had so completely stopped—it is quite true not for all time—that it could not be said that the process of unloading was going on, even although the unloading was not complete; and I think myself that the proviso to [reg.] 19 indicates that the object of the regulation is to provide for what is to happen while the process of unloading is going on." Scrutton L.J. also said: "I cannot see any obligation in the Regulations to fence a hatch on which the hatchways have not been put after unloading has ceased. Reg. No. 19 in the first paragraph does seem to be absolute: but the proviso appears to shew that the obligation either to fence or cover the hatch only applies during the period of employment; and in the case of a 'tween deck hatch, which it is not necessary to close for the safety of the ship or cargo, I cannot see any obligation to fence it at a time when the people working on discharging are no longer working." The Docks Regulations, 1925, do not contemplate that a person carrying on the process of unloading shall be responsible for what happens in his absence after the process has finished. There is nothing in the Regulations which so provides, and if the Court so holds it will depend upon a strained construction put upon the Regulations.

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(1) 128 L. T. 307.

(2) 19 Ll. L. Rep. 176, 178, 179.

LORD HEWART C.J. [after stating the facts set out in the special case, continued :] Now, in approaching the question whether the Court of quarter sessions, in upholding the decision of the justices, came to a correct conclusion, it is a little important to have regard to the history of this matter. The statute under which the information was preferred is the Factory and Workshop Act, 1901, and by s. 79 of that statute " Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb " he may certify that process to be dangerous, and thereupon he may make regulations. Regulations were in fact made by the Secretary of State on October 24, 1904 (St. R. & O., 1924, No. 1617), " in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf or quay, and the processes of loading, unloading or coaling any ship, in any dock, harbour or canal," docks being expressly named in s. 104 of the Factory and Workshop Act, 1901. Those Regulations, as experience proved, were in some respects insufficient. For example, while in general it is the purpose of the Factory and Workshop Acts to protect the life and limb, both of persons employed by the owners of the factory, and also of all persons working in the factory although not so employed, these Regulations were described as "Regulations for the protection of persons employed in the processes or in any of them." Further, when one comes to the particular regulation about hatchways, which in that series is No. 19, experience also proved that, for the purposes of the Act, the Regulations were not complete.

A case of *Owner* v. *C. J. King & Sons, Ld.* (1), was decided in 1922, where it was held that the words of reg. 19, read in conjunction with the other regulations, referred only to a case where there was more than one hatchway within the sphere of the activity of the person carrying out the work or of his employees. In giving judgment in that case I said (2): "The justices . . . . have found in this case the facts, which it is not necessary for me to dwell upon, and that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry out work; in other words, those hatchways which have been or are being used or are to be used by the particular persons employed by him or by his agents upon the carrying out of the process." Afterwards the case of *Howlett* v. *Shaw, Savill & Albion Co.* (3) was decided in 1924 by the Court of Appeal. I need not refer to that case more particularly. Subsequently new regulations were made on March 6, 1925, by the Secretary of State in consequence of those decisions, and those regulations, called the Docks Regulations, 1925 (St. R. & O., 1925, No. 231), are the regulations under which the prosecution now in question was launched. The words in the Regulations of 1904 limiting the benefit of the Regulations to persons employed in the processes were omitted from the Regulations of 1925. The words in my judgment in *Owner* v. *C. J. King & Sons, Ld.* (2), to which I have referred, form the basis of the proviso to para. (*d*) of the "Duties" set out at the commencement of the Regulations; and the substantive provision in para. (*d*) and the proviso

(1) 128 L. T. 307.

(2) 128 L. T. 309.

(3) 19 Ll. L. Rep. 176.

alike were founded upon the assumption that no attempt was made in *Owner* v. *C. J. King & Sons, Ld.* (1), to dissent from the proposition that a person who was loading or unloading at a hatchway must look after the safety of that hatchway. Therefore one finds on p. 2 of the Regulations under the head of "Duties": "(*b*) It shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II. of these Regulations. (*c*) It shall be the duty of the owner of machinery or plant used in the processes, and in the case of machinery or plant carried on board a ship not being a ship registered in the United Kingdom it shall also be the duty of the master of such ship, to comply with Part III. of these Regulations. (*d*) It shall be the duty of every person who by himself, his agents, or workmen, carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV. of these Regulations." "Processes" had been defined as "the processes above mentioned," and the processes above mentioned are "the processes of loading, unloading, moving and handling goods in, on, or at any dock," etc. Now stress was laid by Mr. Langton in the course of his ingenious argument upon the present tense "carries on," and that argument is, no doubt, the basis of the contention urged, as the case finds, by the appellants, that the "Regulations only applied to a person carrying on a process during the time that the process was being carried on by him." I cannot take that view of these words. In my opinion these words "Every person, who by himself, his agents, or workmen carries on the processes" are merely descriptive words designating the person who is engaged in the occupation of loading or unloading or moving or handling the goods. Then comes the proviso: "Provided that while the processes are being carried on, it shall be the duty of the owner, master or officer in charge of a ship to comply with regulation 34, so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the

(1) 128 L. T. 307.

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processes." In other words, that enumeration closely follows the enumeration observed in my judgment in *Owner* v. *C. J. King & Sons, Ld.* (1), distinguishing those hatches which are not in use and which have not been used, and those hatches which are not in use and which are not about to be used; and an exception is quite deliberately made with regard to hatches which are not in use but which have been used. It is to be observed that those words appear in the proviso which puts certain duties upon the owner, master, or officer in charge of a ship. The substantive part of this provision is to describe the duty of the person who carries out the processes, and I think it is quite obvious, when one looks at these words side by side with the cases which intervened between the making of the old Regulations and the new Regulations, that it was intended that the person doing the unloading should be responsible for the safety of the hatch which he was using or which he had used; that is to say, that he must observe, for example, reg. 34, so that, except during meal times, or other short interruptions of work during the period of employment or the trimming of hatches not accessible to persons employed, the hatch covers must be replaced on the hatches in the positions indicated by the markings.

It has been strongly urged on behalf of the appellants that the replacing of such hatches, or the covering of hatches which were in such a position or condition as to require fencing or secure covering, was no part of the work of unloading, and reference for that purpose was made to the case of *Stuart* v. *Nixon & Bruce.* (2) It was sought, with no little ingenuity and persistence, to distinguish in this respect the work of unloading from the work of loading. It is quite obvious that, in the circumstances of that case at any rate, it had been found that the task of covering the hatches was a part of the work of loading, notwithstanding that at the time when the work of covering the hatches began all the cargo had been stowed in the holds. It seems to me that the attempt to distinguish between the work of loading

(1) 128 L. T. 307, 309.

(2) [1901] A. C. 79.

and unloading for this particular purpose entirely fails, and the matter is made quite clear by what was said by Lord Halsbury L.C. in *Stuart* v. *Nixon & Bruce* (1), which I need not repeat. In my opinion it is just as obviously true of the process of unloading as it is of the process of loading to say that putting on the hatch covers is ancillary to the main transaction, and is a part of the work in respect of which the Legislature contemplated that protection was desirable.

I think, therefore, that upon the true construction of these Regulations, especially when they are regarded in the light of the antecedent decisions, the Court of quarter sessions came to a correct conclusion. The present appellants were engaged in unloading hold No. 6, they had taken out all the grain, it remained for them to see that the covering of that hatch was put in its proper place, and that the hatch covering was where it ought to be. In other words they were to leave the place safe for persons passing to and fro upon the ship. It seems to me that to attempt to distinguish between the two processes of loading and unloading, so far as the ancillary or final operation of covering the hatch is concerned, is quite impossible, and that there is no such distinction between the two processes. I think therefore that the contentions which were urged below on the part of the respondent were right and that the justices came to a true construction in point of law in accepting them.

I abstain from criticizing the phrasing of these Regulations, tempting as it might be to essay that task. Knowing something of the difficulties under which such Regulations are brought into existence, I desire to refrain from unnecessary criticism, and, so far as the particular Regulations are concerned, whatever obscurity may be in them when they are looked at alone is, I think, removed when one looks at the history of the matter to which our attention has been directed by the Attorney-General.

For these reasons I think that this appeal fails and ought to be dismissed.

(1) [1901] A. C. 91.

AVORY J. I am of the same opinion. The question raised by this information is whether it became the duty of the appellants, in the circumstances, either to fence or to secure and cover this hatch, which was a 'tween deck hatch. That depends upon whether they are brought within No. 34 of these Regulations by para. (*d*) of the "Duties" set out at the commencement of the Regulations. That paragraph says: "It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV. of these Regulations," reg. 34 being one of those in Part IV. The whole question therefore resolves itself into this, whether the appellants were persons carrying on the process of unloading this ship. It has been contended before us that those words should be construed as imposing a duty only upon the appellants while they were actively engaged in the actual unloading, and that as soon as the actual unloading was concluded they ceased to be persons who are carrying on the process of unloading. In my opinion that is not the proper construction of those words in view of the history and all the circumstances in which these Regulations came into force. I think that the words "carries on the processes" may be properly paraphrased by saying that the person who, in fact, does the loading or the unloading of the ship is to be liable for the duty imposed by reg. 34. There is no question that the appellants were the persons who in the present case, in fact, did the unloading, and therefore they were liable for the duties imposed by reg. 34. I think that the justices were right.

TALBOT J. I am of the same opinion. Speaking for myself, I think that looking only at these Regulations by themselves it is most difficult to ascertain what the true answer is to the question raised in this case. But we have been referred to two cases, the case in the House of Lords of *Stuart* v. *Nixon & Bruce* (1) and more particularly to the

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case of *Owner* v. *C. J. King & Sons, Ld.* (1), and especially to the judgment of the Lord Chief Justice, and it seems to me that if we were to interfere with the conclusion of the justices we should, in view of those cases and what was said in them, merely be introducing fresh and unnecessary confusion into the law on this matter.

Appeal dismissed.

Solicitors for appellants: *Grundy, Kershaw, Samson & Co.*
Solicitor for respondent: *Solicitor to the Treasury.*

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THE KING *v.* THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM.

Medical Practitioner—General Council of Medical Education and Registration—Removal of Name from Register—Application by Practitioner—Powers of General Council—"Infamous conduct"—Standing Orders of General Council—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *ss.* 14, 16, 29.

By ss. 14 and 16 of the Medical Act, 1858, the General Council of Medical Education and Registration are to keep a register of the names of medical practitioners duly qualified in accordance with the Act. By s. 16 the Council are directed to make orders regulating the registers to be kept under the Act. By s. 29 if any registered medical practitioner shall be judged by the Council to have been guilty of "infamous conduct in any professional respect" the Council may, if they see fit, direct the registrar to erase the name of the practitioner from the register.

By an order, chapter 13 of the Standing Orders of the Council made under s. 16 of the Act, every application by a registered medical practitioner for the removal of his name at his own request from the register must be accompanied by a statutory declaration by the applicant that he is not aware of any reason for the institution of any proceedings which might result in establishing cause for the erasure of his name from the register without his consent; and, after certain preliminaries have been complied with, the Council shall, if they think fit, direct the registrar to remove the name of the applicant from the register. By another of the Standing Orders made under s. 16 of the Act, when information is received by the Council that a registered medical practitioner has been guilty of conduct which prima facie constitutes infamous conduct in a professional respect, the Council may hold an enquiry and hear and determine the case and adjudge the practitioner to have been guilty of infamous conduct in a professional respect and direct that his name shall be erased, and the registrar shall forthwith erase his name from the register.

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(1) 128 L. T. 307.

A medical practitioner whose name was on the medical register applied to have his name removed at his own request under chapter 13 of the Standing Orders. After the application was received by the Council and before it was heard and determined the Council received information that the practitioner had been guilty of conduct prima facie constituting infamous conduct in a professional respect. An enquiry was then held and the Council adjudged that the practitioner was guilty of infamous conduct in a professional respect and by their direction his name was erased from the register:—

Held, that the practitioner was not entitled to have his name removed from the medical register on his mere application for that purpose; that until the Council ordered his name to be removed he was still a registered medical practitioner, and that in ordering his name to be erased for infamous conduct in a professional respect the Council had acted within the powers conferred upon them by the Act and by their Standing Orders validly made thereunder.

APPEAL from the decision of a Divisional Court discharging a rule nisi obtained by the prosecutor, John William Kynaston, which was directed to The General Council of Medical Education and Registration of the United Kingdom ordering them to show cause why a writ of mandamus should not issue commanding them to delete from the register of the said Council all records of the said John William Kynaston having been removed penally.

From the affidavits filed in the proceedings in the King's Bench Division the following facts appeared:—

The prosecutor was a member of the Royal College of Surgeons of England, a Licentiate of the Royal College of Physicians of London, and a Licentiate of the Society of Apothecaries, London. From 1886 to 1905 he held a commission as an officer on the active list of the Royal Army Medical Corps. In 1914 he was recalled to the active list having in the meantime been transferred to the Reserve of Officers. In 1919 he was placed on the Retired List with the rank of Lieutenant-Colonel. As a medical practitioner and as an officer in the Army he had made a special study of diseases of the throat and held the opinion that operations performed on young children for removing tonsils and adenoids were in most cases unnecessary and might be replaced by medical or other modes of treatment, which he wished to make known to public authorities. Early in 1920 he applied to the Ministry of Health, of which Sir George Newman was the Chief Medical Officer, for leave to demonstrate to the medical officers serving under him the alternative methods which he advocated; but the Ministry of Health refused his application. Thereupon he published a book and wrote letters which were published in various newspapers and in particular an appeal to the editor of The Times which was published in that paper on October 14, 1921. He also carried on an intermittent correspondence with Sir George Newman and the Ministry of Health from 1920 to 1922 on the subject of his treatment.

On March 24, 1922, he applied by letter to the registrar of the General Council of Medical Education and Registration of the United Kingdom (hereafter called "the Council"), to have his name removed at his own request. (1) In reply to his application he was informed that it should have been supported by a statutory declaration that he was not aware of any proceedings or of any reasons for the institution of any proceedings, which might result in establishing cause for the erasure of his name from the register without his consent. On April 1, 1922, he forwarded to the registrar a statutory declaration in accordance with the terms of the registrar's letter. By a letter dated April 5, 1922, the registrar informed him that a society called the Medical Defence Union, Ld., had preferred two charges against him of advertising and canvassing for patients by means of a printed slip inserted in a book entitled Adenoids and Enlarged Tonsils curable without Operation, inviting persons who had been advised that adenoids or enlarged tonsils are the cause of any trouble, or that their removal was necessary to obtain relief, to communicate with him; and also by means of a letter in a newspaper stating that he was ready to give advice by post to all applicants. The registrar's letter went on to state that the matter would be considered in the first instance by a committee of the Council. On April 21, 1922, a further complaint was lodged by the Medical Defence Union relating to an advertisement in a paper called John Bull of " The Kynaston Institute.—Medical Director Lt.-Col. John Kynaston. . . . . Established to furnish free advice in cases of enlarged tonsils and adenoids." . . . .

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(1) This was presumably in pursuance of Chapter XIII. of the Standing Orders of the General Medical Council. See Note at the end of this Report.

On May 1, 1922, the solicitor to the Council, on the instructions of the Penal Cases Committee of the Council, sent to the prosecutor notice in writing of an enquiry to be held by the Council into the charges made against him by the Medical Defence Union. A meeting of the Executive Committee of the Council was held on May 22, 1922, at which the application of the prosecutor for the removal of his name from the Medical Register at his own request was reported; the matter was adjourned pending the hearing of the charges brought by the Medical Defence Union. An enquiry into these charges was heard on May 24, 1922, and adjourned until the following day, on which day the Council found the facts alleged against the prosecutor to have been proved and he was adjudged to be guilty of infamous conduct in a professional respect, and the registrar was directed to erase his name from the Medical Register. His name was accordingly erased.

On May 30, 1929, he sent a formal notice to the registrar requiring him to restore his name to the register with particulars of his residence, medical titles, diplomas and qualifications and threatening to apply for a mandamus requiring the registrar to perform these acts in case he failed to do so.

On July 19, 1929, the prosecutor obtained a rule nisi directed to The General Council of Medical Education and Registration of the United Kingdom ordering them to show cause why a writ of mandamus should not issue commanding them " to delete from the register of the said Council all records of the said John William Kynaston having been removed penally." On July 26, 1929, the Council showed cause and the King's Bench Division discharged the rule nisi.

The prosecutor appealed.

The substantial ground of the appeal was that the respondents had no authority or power to keep the appellant's name on the medical register, or to admit any complaint from the Medical Defence Union against him, after he had made a proper application to have it removed.

He also complained of bias on the part of Sir George Newman, who as a member of the Council heard part of the enquiry, but retired before the deliberation and decision. In the opinion of the Court there was no evidence in support of this charge, and the point is therefore not considered worth reporting.

Wallington and *John M. Buckley* for the appellant.

Montgomery K.C. and *D. C. Bartley* for the respondents were not called upon.

The arguments of counsel sufficiently appear from the judgments.

SCRUTTON L.J. This appeal must be dismissed.

In June, 1929, the appellant, Colonel Kynaston, holding at one time or another qualifications of the Society of Apothecaries, the Royal College of Surgeons and the Royal College of Physicians, applied to the King's Bench Division for a writ of mandamus requiring the General Council of Medical Education and Registration of the United Kingdom and the registrar appointed by the Council to delete all record of his name having been removed penally. The application did not in terms express what record was to be deleted, or where it was to be found, whether in the register, or among the proceedings of the Council, or elsewhere. That application was, of course, made ex parte, and on June 19, after hearing counsel on behalf of Colonel Kynaston, the Court made an order nisi "that the General Medical Council of the United Kingdom "should" show cause why a writ of mandamus should not issue directed to them pursuant to the statutes in that behalf commanding them to delete from the register of the said Council all records of the said John William Kynaston having been removed penally." Cause was then shown by the Council, and the order nisi was discharged; that is to say the Council were not called upon to delete any record in the register of Colonel Kynaston's name having been removed penally. Colonel Kynaston now appeals from the decision discharging the order nisi and asks that this Court should, I suppose, order that the record of his name having been removed penally shall be deleted. There are many difficulties in the way of granting his request; first, that the only record in the register is a line drawn through the name of Colonel Kynaston signifying that his name is taken off the register; secondly, that the application for the mandamus was not made until seven years after the name had been removed. Of course each case must be decided on its own particular facts, but as a general rule delay in making the application is a good reason for refusing the writ of mandamus. But I do not wish to decide this appeal upon technical grounds beyond protesting against any notion that a mandamus will issue seven years after the event complained of without a conclusive explanation of the delay. I propose to decide this appeal upon the merits, as it is said to be a matter of public importance.

The Medical Act, 1858, which is the Act we have to consider, does not in terms provide for the establishment of a register. It assumes that a register of medical practitioners will be established by a certain body, and it provides by s. 32 that no person shall be entitled to recover his fees unless he proves at the trial that he is registered under the Act. Sects. 14 and 16 both assume the existence of a register which it is the duty of the registrar to keep in accordance with the provisions of the Act and the orders and regulations of the Council. (1) Sect. 16 requires the Council to make orders for regulating the register. Certain events are expressly provided for; for instance, by s. 14 if a man dies the registrar shall erase

(1) The relevant sections of the Medical Act, 1858, and the chapters and sections of the Standing Orders of the General Medical Council applicable to this case are set out in a note at the end of this report.

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his name; and if the registrar writes a letter to any registered person, addressed to him according to his address on the register, to enquire whether he has ceased to practise or has changed his address, and gets no answer back, he may erase the name of the person from the register. Moreover it is quite clear that some matters must needs be dealt with by the Council; changes of address, for instance; there must be some means whereby a registered person who has changed his address may have his new address entered in the register; and similarly if he should change his name on succeeding to a title or having property left to him. Accordingly the Council, acting under s. 16 of the Act have made certain Standing Orders for regulating the register.

Now in addition to the duty of keeping a correct register, a very important jurisdiction is conferred upon the Council by s. 29 of the Act. "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour . . . . or shall after due enquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." That is not a purely ministerial matter. If a registered person has been convicted of a felony or misdemeanour, or if he has been found guilty of what is described as "infamous conduct," his name does not automatically come off the register. The Council may have his name erased "if they think fit." This imposes upon the Council something more than a merely administrative duty of keeping a correct register. It imposes upon them a judicial duty if they see fit after due enquiry, to have the name erased; and it is clear that the process of carrying out this duty must come within the purview of the rules or standing orders for regulating the register.

The main contention of Mr. Wallington on behalf of the appellant is that the jurisdiction conferred on the Council by s. 29 of the Act is a jurisdiction over medical practitioners whose names are on the register, and that the Council have no jurisdiction over one whose name is not on the register;

and that just as a medical practitioner has under s. 15 a right to have his name on the register if he has the prescribed qualifications and pays the necessary fees, so he has the right to have his name taken off the register by merely writing a letter requiring this to be done. I can find no such right in the Act. It is said to be a normal right. I do not understand what that means. The statute gives a man under certain conditions a right to have his name upon the register. It also makes certain provisions whereby names may in certain circumstances be removed from the register; but nowhere does it say that a man is entitled on his mere request to have his name removed. And it is idle to suppose that a registered medical practitioner who has been charged with infamous conduct in a professional respect may avoid all enquiry into his conduct by the simple means of a request to have his name taken off the register. To allow this escape would defeat the object of s. 29, which is to enable the General Medical Council to strike a man's name off the register, not at his request but at their discretion, either because he has been convicted of felony or misdemeanour or because he has been guilty of infamous conduct in a professional respect. It is a great pity that the word "infamous" is used to describe the conduct of a medical practitioner who advertises. As in the case of the Bar so in the medical profession advertising is serious misconduct in a professional respect and that is all that is meant by the phrase "infamous conduct"; it means no more than serious misconduct judged according to the rules written or unwritten governing the profession. It has been well settled by *Leeson* v. *General Council of Medical Education and Registration* (1); *Allinson* v. *General Council of Medical Education and Registration* (2) and another case which was cited (3), that the Council are the judges without appeal of the existence or absence of serious misconduct in a professional respect. In a case where there was no evidence before the Council which would warrant a finding of serious

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(1) (1889) 43 Ch. D. 366.

(2) [1894] 1 Q. B. 750.

(3) Possibly *Allbutt* v. *General Council of Medical Education and Registration* (1889) 23 Q. B. D. 400.

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misconduct, the fact that they had found serious misconduct might lead to the conclusion that they had not acted honestly in respect of the charge brought before them: see per Cotton L.J. in *Leeson's* case. (1) Or it might be contended that the Council have no jurisdiction to decide whether a man is guilty of serious misconduct in a professional respect when there is no evidence before them on which they could come to such a decision. But there is no want of evidence to support the finding of the Council in the present case. It appears that the appellant, influenced no doubt by most admirable motives, has inserted in a paper the following advertisement: "The Kynaston Institute. Medical Director, Lieutenant-Colonel John Kynaston. Established to furnish free advice in cases of enlarged tonsils and adenoids. Dr. Kynaston has devoted 12 years to its study. His free advice is offered to any 'John Bull' reader who may be a sufferer." Colonel Kynaston having inserted that advertisement, it was beyond all question open to the Council to find that he had been guilty of serious misconduct in a professional respect. For these reasons the main argument of Mr. Wallington on the merits of the case cannot be supported, and this appeal must be dismissed.

GREER L.J. I am of the same opinion. In the year 1922 the appellant was on the medical register. He desired to have his name removed, and he made an application to the General Medical Council to remove his name, from the register. They did not immediately act upon the application, but they asked him, as they were entitled to do under their regulations, to make a statutory declaration that he was not aware of any proceedings, or of any reason for the institution of any proceedings which might give cause for erasing his name from the register without his consent under s. 29 of the Medical Act, 1858. Before the application was heard and determined, complaints of his conduct reached the Council which, if proved, might lead to the conclusion that he had been guilty of "infamous conduct" in a professional respect,

(1) 43 Ch. D. 378.

within s. 29 of the Act. In accordance with the Act and with their Standing Orders, the Council held an enquiry, as the result of which they decided that the appellant had been guilty of infamous conduct in a professional respect and, in accordance with s. 29, directed the registrar to erase his name from the register.

It is not and cannot be contended that there was no evidence on which the Council could have come to this conclusion or, except for the points argued, that their decision was ultra vires. The appellant complains of that decision on three grounds. It is true that his application is not in order at all, but I fully concur with Scrutton L.J. in preferring to decide this appeal as if the application was properly constituted, and to deal with the argument that the decision of the Council ought to be treated as a nullity as being one which they had no power to make.

First of all it is said that they had no power to hold the enquiry, and no power to pass the resolution that the appellant had been guilty of infamous conduct in a professional respect, and no power to direct the registrar to erase from the register the name of the appellant, because in law he was not on the register at all. Secondly, it was argued that the enquiry was not really with a view to the question whether the appellant's name should be erased, but was merely directed to the question whether he should be suspended, and that, as the Medical Act, 1858, gives no power to suspend there was no proper enquiry under s. 29 of the Act. Thirdly, it is said that the decision ought to be quashed because one of the members of the Council who was present during the hearing of the enquiry, but took no part in the adjudication, was biassed. The important point is the first one. It involves the question whether a medical practitioner whose name is on the register can determine for himself that it shall no longer remain there, and whether, if he so determines, he ceases to be a registered medical practitioner.

The register is the creation of the Medical Act, 1858. In order to find out how the register is to be kept, who is to keep it, what names are to be put on it, and when those

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names are to be taken off it, we must look to the Act and to the Act alone. From beginning to end of the Act I can find no provision enabling a registered medical practitioner of his own motion to direct that his name shall be removed from the register, unless such a provision is to be inferred from the combined effect of ss. 14 and 16 of the Act. Sect. 14 provides that it shall be the duty of the registrars to keep their respective registers correct in accordance with the provisions of the Act, and the orders and regulations of the Council, and shall from time to time make the necessary alterations in the addresses or qualifications of the persons registered under the Act; and by s. 16 the Council shall "from time to time as occasion may require, make orders for regulating the registers to be kept under this Act as nearly as conveniently may be in accordance with the form set forth in Schedule D to this Act, or to the like effect." From these provisions it is quite clear that the Council have to keep a register with the assistance of their registrar. In certain events the registrar is to take a name off the register; he is to do this when there is a regulation made by the Council to that effect. Under these two sections the Council are enabled to make regulations, provided they are consistent with the Act, relating to the keeping of the register and the maintenance of names upon it; and the regulations which the Council have made with respect to the way in which an application by a registered medical practitioner to have his name removed from the register is to be presented and dealt with, are in my opinion within and not beyond the powers conferred on the Council by the Act. There is no right at common law apart from the Act and, until the regulations have been complied with, there is no provision in the Act, entitling a registered medical practitioner to have his name removed from the register. It was suggested that the right of a duly qualified medical practitioner to have his name entered in the register necessarily involves a right to have it removed from the register. I do not accede to that argument. It does not at all follow that because a practitioner has a right to have his name on the register therefore he has a right to take if off in all events.

There is no such right except in so far as it is granted by the power to make regulations and by the regulations made under that power. The case cited in support of the alleged right, *Finch* v. *Oake* (1), related to the implied rights and obligations of a member of a voluntary association and has no bearing on the meaning and effect of the Act of Parliament with which we have to deal.

[The Lord Justice then dealt with the other two points, which do not raise any question of principle.]

Slesser L.J. I agree. This is an appeal from an order of the King's Bench Division discharging a rule nisi calling upon the General Medical Council to show cause why a writ of mandamus should not issue commanding them to delete from the register of the said Council "all records of the said John William Kynaston having been removed penally." There is in fact no evidence that any record exists in the register of the Council that John William Kynaston had been removed penally, or any record to the like effect. The only evidence is that of the registrar of the Council who states that an enquiry was held on Wednesday, May 24, 1922; that Colonel Kynaston appeared in person, and that in the result the President announced the decision as follows: "John William Kynaston, I have to inform you that the Council has found the facts alleged against you in the notice of enquiry to have been proved. They have judged you to be guilty of infamous conduct in a professional respect, and they have directed the registrar to erase your name from the medical register." The name was in fact erased, but there is no evidence that the register contains any record that John William Kynaston was removed penally.

Now the Court will not order a writ of mandamus to issue where obedience to the writ cannot be rendered. If this writ were to issue, the Council could not obey it, because no one can delete a record which does not exist. Therefore on technical grounds this Court cannot hold that the learned judges in the King's Bench Division were wrong in discharging the

(1) [1896] 1 Ch. 409.

rule nisi. But I agree with my brothers that it is more satisfactory to decide this appeal on the merits; and I agree that, even if the application had been for a certiorari to bring up the decision of the Council or for an order to perform some other possible act, still the appellant must have failed to maintain the argument he has submitted.

It was contended that the Council had no authority to proceed under their Standing Orders because the appellant, on applying as he did to the registrar, had a right to have his name removed from the register on his own motion, and that, as his name therefore ought to have been removed when he made his application, he was not properly on the register when the Council purported to exercise their penal jurisdiction, for he was not then subject to their jurisdiction at all. I cannot agree to this contention, for I am clearly of opinion that when the Medical Act, 1858, is considered, and particularly ss. 14 and 16 of that Act, it affords no right to any medical practitioner whose name is on the register to have his name removed from the register at his own volition or otherwise than in accordance with the regulations made by the Council for the purpose of keeping the register. Sect. 14 provides that it is the duty of the registrars to keep their registers correct in accordance with the provisions of the Act and the orders and regulations of the Council. Then follow powers to erase the names of persons who have died or who have changed their residences; and then there is a provision relating to restoration. By s. 16 the Council are given powers to "make orders for regulating the registers to be kept under this Act as nearly as conveniently may be in accordance with the form set forth in Schedule D to this Act."

In pursuance of these sections the Council have made regulations, particularly chapter 13 of their Standing Orders, which provide for the removal of a practitioner's name from the register at his own request, and these regulations require that the practitioner applying to have his name removed shall make a statutory declaration that "he is not aware of any proceedings, or of any reason for the institution of any proceedings, which might result in establishing cause for the erasure of his name from the register without his consent." Some such provision is obviously necessary, for without it a person might ask to have his name removed from the register, and then commit such unprofessional acts as he pleases, and then make a further application to be replaced on the register, which he would be entitled to do under s. 15 of the Act. Moreover that Standing Order is, in my opinion, well within the powers conferred on the Council by ss. 14 and 16 of the Act. They had the right to require the statutory declaration, and the power, if they pleased, to make or abstain from making a formal resolution to remove the appellant's name from the register under s. 4 of chapter 13 of the Standing Orders. In point of fact, information reached them between the date of his application and the time when by formal resolution they might have removed his name at his own request, the result of which information was that they acted on their power under chapter 14 of their Standing Orders rather than on the appellant's application.

The second point made on behalf of the appellant is not pressed; and with regard to the question of bias, the evidence fails completely to show any bias on the part of Sir George Newman.

For these reasons I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. F. Iwi.*
Solicitor for respondents: *C. J. S. Harper.*

NOTE.

The Medical Act, 1858, s. 14: "It shall be the duty of the registrars to keep their respective registers correct in accordance with the provisions of this Act, and the orders and regulations of the General Council, and to erase the names of all registered persons who shall have died, and shall (sic) from time to time make the necessary alterations in the addresses or qualifications of the persons registered under this Act; and to enable the respective registrars duly to fulfil the duties imposed upon them it shall be lawful for the registrar to write a letter to any registered person, addressed to him

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according to his address on the register, to inquire whether he has ceased to practise, or has changed his residence; and if no answer shall be returned to such letter, within the period of six months from the sending of the letter, it shall be lawful to erase the name of such person from the register: Provided always, that the same may be restored by direction of the General Council should they think fit to make an order to that effect."

Sect. 15: "Every person now possessed, and (subject to the provisions herein-after contained) every person hereafter becoming possessed, of any one or more of the qualifications described in the schedule (A) to this Act, shall, on payment of a fee . . . . be entitled to be registered on producing to the registrar of the branch council for England, Scotland, or Ireland, the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such registrar information of his name and address, and evidence of the qualification or qualifications in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained." . . . .

Sect. 16: "The General Council shall, with all convenient speed after the passing of this Act, and from time to time as occasion may require, make orders for regulating the registers to be kept under this Act as nearly as conveniently may be in accordance with the form set forth in schedule (D) to this Act, or to the like effect."

[The Form in Sch. D is a form of a list in four columns containing the name, residences, qualifications and titles of the registered practitioners. The fourth column containing the titles of the practitioners was dispensed with by the Medical Act, 1859 (22 Vict. c. 21), s. 3.]

Sect. 29: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

Standing Orders of the General Medical Council.

Chapter XIII., s. 1.: 1. Every application by a registered medical practitioner for the removal of his name at his own request from the register shall be accompanied by a statutory declaration, made by the applicant, that he is not aware of any proceedings, or of any reason for the institution of any proceedings, which might result in establishing cause for the erasure of his name from the register without his consent, or for depriving him without his consent of any qualification or licence entitling him to be registered.

2. Every such application shall, in the first instance, be referred by the registrar to the medical authorities who granted the applicant his qualification or qualifications, in order to ascertain whether there is any valid objection to such removal.

3. The registrar shall bring the application before the next meeting of the Executive Committee, who shall consider the application and any objection thereto and report to the Council.

4. The Council shall, if they think fit, by formal resolution, put by the President from the Chair, direct the registrar to remove the name of such applicant from the register.

5. The registrar shall, upon the removal of the applicant's name from the register, send notice of such removal to the applicant by a letter addressed to his registered or last known address.

Chapter XIV. 1. When complaint is made to, or information is received by, the Council that a registered medical practitioner has been . . . . guilty of conduct which prima facie constitutes infamous conduct in a professional respect, the registrar shall submit such complaint or information or an abstract thereof to the President.

2. Where the information in question is in the nature of a complaint by a person or body charging the practitioner with infamous conduct in a professional respect, such complaint shall be formulated in writing, addressed to the registrar, stating the grounds thereof, and shall be accompanied by one or more statutory declarations as to the facts of the case. If the complaint is made by or on behalf of a Government Department or Public Body, or a Constituent Body of the Council as defined by s. 10 of the Medical Act, 1886, statutory declarations may be dispensed with . . . .

4. The President shall, if he thinks fit, instruct the registrar to ask the practitioner for any explanation he may have to offer. The documents, including any explanation forwarded by the practitioner to the registrar, shall then be referred to the Penal Cases Committee, who shall consider them . . . . If the Committee resolve that the case is one in which an inquiry ought to be held, the President shall direct the solicitor to take steps for the institution of an inquiry, and for having the case heard and determined by the Council . . . .

8. Enquiries before the Council shall be conducted in accordance with the rules set out in the Schedule to this Order.

9. Upon the conclusion of the case, the Council will deliberate thereon in private, and at the conclusion of the deliberations the President shall call upon the Council to vote on such of the following series of resolutions (A) or (B), to be put from the Chair, as are applicable to the case . . . .

B.

In the case of a charge of infamous conduct in a professional respect :—

"(1.) That the Council do now proceed to decide whether the facts alleged against" [the practitioner] "in the Notice of Enquiry have been proved or have not been proved." . . . .

If resolution (1.) is carried, the President shall call upon the Council to vote on the following resolution (2.) to be put from the Chair :—

"(2.) That the facts [or the following facts (specifying them)] alleged against" [the practitioner] "in the Notice of Enquiry have been proved to the satisfaction of the Council." . . . .

If resolution (2.) is carried, the Council may either proceed to judge whether on the facts proved the accused practitioner has been guilty of infamous conduct in a professional respect and to direct the registrar to erase his name from the register, or may postpone their judgment until the next or some future session.

For the purpose of deciding whether or not the judgment of the Council on the facts proved shall be postponed, the President shall call upon the Council to vote on the following resolution (3.) to be put from the Chair :—

(3.) "That the Council do now proceed to pronounce their judgment on the facts proved against" [the practitioner] . . . .

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If resolution (3.) is carried, the Council shall proceed at once to pronounce their judgment on the case, and the President shall call upon the Council to vote on the following resolution (4.) to be put from the Chair:—

(4.) "That the Council do now judge" [the practitioner] "to have been guilty of infamous conduct in a professional respect, and do direct the registrar to erase from the Medical Register the name of" [the practitioner] . . . .

If resolution (4.) is carried, the registrar shall forthwith erase the name from the register.

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Workmen's Compensation—Partial Incapacity—Weekly Payments—Earnings in "Suitable Employment"—Workman's Family—Lack of Accommodation—Injury to Wife's Health—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9.

By s. 9, sub-s. 1, of the Workmen's Compensation Act, 1925, compensation payable to a workman who has been injured by an accident arising out of and in the course of his employment is to be by way of weekly payment during incapacity resulting from the injury. By sub-s. 3 it is provided that, in certain events (which happened), the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is "able to earn in some suitable employment or business" after the accident.

A workman employed by a railway company as a foreman ganger, living in a village in Lincolnshire with his wife, whose lungs were delicate, and his four children, was partially incapacitated as the result of an injury from an accident arising out of and in the course of his employment. His average weekly earnings before the accident amounted to 3*l.* 1*s.* 11*d.* The company offered him, first at Bradford and then at Sheffield, work which he was capable of doing and in which he could earn 2*l.* 6*s.* 9*d.* a week; and they made him weekly payments of 7*s.* 7*d.* The workman refused the employment offered as not being "suitable" within the meaning of s. 9, sub-s. 3, of the Act on the grounds that, as he alleged: (1.) in neither of the places mentioned could he find accommodation for his family, and (2.) that his wife's health would suffer if she had to live in either of them; and he applied to the county court for an award of compensation:—

Held, affirming the award of the county court judge in favour of the company, that the lack of accommodation for the family of the workman and the possible or probable injury to his wife's health were irrelevant to the question whether available employment was "suitable" within the meaning of the Act.

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APPEAL from an award of the judge of the County Court of Lincolnshire holden at Brigg in a matter arising under s. 9, sub-s. 3, of the Workmen's Compensation Act, 1925. (1)

Albert Edward Broughton, the applicant, was a foreman ganger working on the permanent way of the London and North Eastern Railway Company, the respondents. This employment obliged him to work in various parts of the respondents' system, according to their requirements. He was a married man of thirty-five years of age with four children, living at Scawby, near Brigg. His wife had in time past suffered from pneumonia and about a year before these proceedings she had an attack of pleurisy. On October 28, 1928, he was injured by an accident arising out of and in the course of his employment, as the result of which he lost the use of his left eye. His average weekly earnings during the twelve months before the accident were 3*l.* 1*s.* 11*d.*. From the date of the accident until February 25, 1929, the respondents paid him compensation at the rate of 1*l.* 10*s.* a week. From and after February 25, 1929, they paid him at the rate of 7*s.* 7*d.* a week in the circumstances following:—

In December 1928 they offered the applicant employment as a goods porter at Bradford Goods Depot, where he would be engaged in checking goods on delivery from the depot, at the rate of 2*l.* 4*s.* a week together with 4*s.* a week bonus less 2½ per cent. The applicant refused this offer on the ground that it was difficult to get accommodation in Bradford and that he did not think it would suit his wife's health. In

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(1) Workmen's Compensation Act, 1925, s. 9, sub-s. 1: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained. . . . ."

Sub-s. 3: "The rules for calculating the weekly payment in the case of partial incapacity shall be:—

"(i.) If the maximum weekly payment would, had the incapacity been total incapacity, have amounted to twenty-five shillings a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

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September 1929 the respondents offered him employment as a weighbridge man at Bradford at 2*l*. 14*s*. a week less 2½ per cent., and later in the same month they offered him employment as a hoist attendant at Sheffield at about 2*l*. 7*s*. 10*d*. a week after deducting 2½ per cent. The applicant refused both these offers on the grounds on which he had refused the first offer.

In these circumstances the respondents contended that they had offered the applicant suitable employment at which he could earn at least 2*l*. 6*s*. 9*d*. a week and that they were only bound to pay him as weekly compensation half the difference between that sum and 3*l*. 1*s*. 11*d*., his average weekly earnings before the accident. The applicant denied that suitable employment had been offered and applied to the county court for an award of compensation from February 25, 1929, onwards.

The county court judge held that in considering whether available employment was "suitable," within the meaning of s. 9, sub-s. 3, of the Act, he could take into account the risk of danger, the restriction of the field of employment, the diminished capacity of the workman to earn wages, possible danger to his fellow workmen, and the man's physical condition; for example, the fact, if it were a fact, that a man could not walk to his employment, would be a matter of his physical condition which could be considered; that a man's labour was not saleable because the only markets in which there was a demand for such labour were inaccessible to him by reason of his physical condition might be a relevant matter. On this point the learned judge cited Willis on Workmen's Compensation, 25th ed. (1927), p. 214. But he held that he could not consider lack of accommodation for the workman's family in a place where there was available employment, nor the health of the workman's wife, any more than he could take into account the state of the labour market. In the result he held that the applicant could earn 2*l*. 6*s*. 9*d*. weekly in a suitable employment and gave his award in favour of the respondents.

The applicant appealed.

W. Shakespeare for the appellant. The county court judge was wrong in holding that inability to find accommodation for a man's family and risk of injury to his wife's health were not matters to be considered in deciding whether employment is or is not suitable within the meaning of s. 9, sub-s. 3, of the Act. The word "suitable" as applied to the employment in which the man can earn wages is not merely synonymous with "profitable": *Pearson* v. *Archibald Russell, Ld.* (1) The employment must be reasonably accessible: *Ball* v. *William Hunt & Sons, Ld.* (2); *Macdonald* v. *Wilsons.* (3) Regard must be had to the physical condition of the man, to the nature and character of his occupation before the accident and the nature of the work which is said to be suitable after the accident: *Eyre* v. *Houghton Main Colliery Co.* (4), per Cozens-Hardy M.R. The employment must not expose the man to risks so dangerous that he feels he is not doing his duty to himself and his family in encountering them: per Fletcher Moulton L.J. (5) His family ties therefore may be taken into consideration. To offer a man employment in Sheffield, to accept which he must leave his wife and family at Brigg, is practically to offer him employment which is inaccessible.

Sir Walter Greaves-Lord K.C. and *Fox-Andrews* for the respondents were not called on.

SCRUTTON L.J. In this case the appellant was a foreman ganger in the permanent employment of the respondents; that is to say, he was promised permanent employment on condition that he moved from place to place on the respondents' system at their direction as they required him. He entered into that obligation when he was a single man. He is now a married man with four children. In the course of his occupation he met with an accident through which he lost the sight of one eye; and an operation had to be performed to remove the damaged eye. For a time he was paid compensation

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(1) 1916 S. C. 536.
(2) [1912] A. C. 496.
(3) [1912] A. C. 513.
(4) [1910] 1 K. B. 695, 697.
(5) [1910] 1 K. B. 700, 701.

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for total incapacity. After a time the respondents proposed to reduce the compensation saying that he was capable of doing certain suitable work, and they offered him employment in two or three places at wages less than those he had formerly earned, with compensation on the footing of partial incapacity in accordance with s. 9, sub-s. 3, of the Workmen's Compensation Act, 1925. The appellant's wife was delicate and suffered from complaints connected with the lungs. The man had for some time been living in a village in Lincolnshire with his wife and family and with his mother in law. He refused to go to the places where he was offered work, giving as his reasons that his wife's health would suffer by the change, and that he was a man with a family, and, after very insufficient enquiry and, as I think, very insufficient evidence, that he could not get accommodation for his wife and family in the places mentioned.

In considering whether there was suitable employment available for the appellant, the learned judge held that he must take into consideration the risk of danger incurred by the man himself from his being a one-eyed man; the restriction of the field of employment, because a one-eyed man is excluded from certain kinds of work; his diminished capacity for earning because he is a one-eyed man; possible danger to his fellow workmen, and his physical condition; but he held that he could not take into account reasons which he described as "personal," by which I understand reasons like that which I put during the argument—namely, that the man was a deacon in some local chapel and did not wish to leave the district in which he was doing good spiritual work. The learned judge must mean something of that kind when he speaks of "personal" reasons as opposed to "physical" condition. He continues: "The fact that a man cannot walk to his employment is a physical reason that should certainly be taken into consideration; the fact that his labour is not saleable in any market accessible to him is a matter which possibly and probably I must take into consideration; but that must apply to him personally"—that is to say to himself and not to his family. Then he says: "See Willis

214"; and when one looks at that reference it is clear that the learned judge was referring to *Eyre* v. *Houghton Main Colliery Co.* (1) where Cozens-Hardy M.R. says that suitability of employment "is a question of fact in each case for the learned judge, having regard not merely to the physical condition of the man but also to the nature and character of his occupation before the accident and the nature of the work which is offered after the accident." These matters the learned judge has taken into consideration; but he goes on: "I think I cannot consider lack of accommodation for the man in a town to which he is asked to move or his wife's health any more than I could consider the state of the labour market"—meaning that on the question of ability to earn wages in a suitable employment it is not admissible to take into account the fact that the state of the labour market was such as to preclude the man from getting employment even if he had not been injured. That follows from *Bevan* v. *Nixon's Navigation Co.* (2) Having said that, the learned judge finds "that the work offered was suitable." That is a finding of fact and we can only interfere with it if the learned judge has considered matters which he ought not to consider or has not considered matters which he was bound to consider. It was for the appellant to show that the learned judge was wrong in not considering the matter which he says he cannot consider—namely, the health of the appellant's wife and the lack of suitable accommodation for his wife and family. In my opinion in cases of this sort the county court judge is not required to consider the personal ties of the man or the state of his family. The employer has to pay compensation. If the accident is such that it does not incapacitate the man totally, but only partially, the compensation is to be "one-half the difference between the amount of the average weekly earnings of the workman before the accident"—that is a known quantity—"and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." The man is to be compensated for his partial incapacity, not for the state of his wife's health or the health of his family; the partial incapacity of the man personally is what has to be measured and its measure is ascertained by taking what he is earning or is able to earn in some suitable employment or business and comparing that with what he was earning before the accident. In the present case the employers say, "You are able to earn 2*l.* 6*s.* 9*d.* a week in a suitable employment; it is true you are not earning it, but that is because you have refused to earn it." Mr. Shakespeare does not and could not dispute that the appellant is able to earn that amount. The question is whether the employment the man was offered is a "suitable employment or business." The county court judge has held that it is a suitable employment or business, but that in coming to that conclusion he has not considered the health of the appellant's wife nor the lack of accommodation for the appellant's wife and children in the places where the employment was offered. In my view the Act excludes the consideration of the state of the workman's family. If he has a family of ten children and two of them are liable to consumption, he cannot say that employment, which would be suitable in all other respects, is unsuitable because two of his ten children could not live in the place where it is offered. The language of the Act as well as its object and intention exclude from the question whether employment is suitable or not, all consequences of the workman being a married man, or of his having a family, and the circumstances affecting his wife and children. These are not matters affecting the man's capacity to work, and in my opinion they should not be taken into account in deciding whether the work offered is suitable employment, and consequently the county court judge was right in holding that he could not consider them.

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(1) [1910] 1 K. B. 695, 697.

(2) [1929] A. C. 44.

Of the cases cited in the argument the one which most resembles this case is *Wallis* v. *M'Neice* (1), where a workman who lived in Belfast and had a family of seven children, four of whom were in employment in that city, was offered employment in Dublin; and, the Recorder of Belfast having found that the employment offered was suitable, the Court of Appeal in Ireland held that the fact that employment was offered in Dublin to a workman with a family in Belfast was not enough to prevent the Recorder from finding as he did.

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(1) (1912) 46 Ir. L. T. 202.

I wish to make it clear that the only point I am deciding is that the state of a man's family and the lack of accommodation for his family are not matters to be considered by the Court in deciding whether employment is suitable or not.

For these reasons I am of opinion that this appeal must be dismissed.

SLESSER L.J. I am of the same opinion. The question which the county court judge had to decide was whether the employment, in which the respondents asserted that the appellant could earn certain wages, came under the description of "some suitable employment" in s. 9 of the Act. In considering this question the learned judge was asked to take into account the facts that the appellant was a married man with a wife in delicate health and four children, and that accommodation for the family was difficult to find. The other matters which were urged on behalf of the appellant; the danger to the appellant himself, restriction of his field of employment, diminution of earning capacity, and possible danger to his fellow workmen; all these matters the learned judge was prepared to consider. But he said: "I think I cannot consider lack of accommodation and the wife's health any more than I could consider the state of the labour market." If the learned judge was right in his view his award is not challenged; but Mr. Shakespeare contends that he ought to have considered the two matters which he held he could not consider—namely, the wife's health and the lack of accommodation for the family—and that therefore the matter ought to be remitted to the county court judge in order that he may consider them.

It is strange that after so many years there is so little authority on this point. Only one case has been cited which seems to bear upon it at all. That is *Wallis* v. *M'Neice* (1), where it was insisted that the word "suitable" could not be properly applied to employment offered in Dublin which would necessitate the breaking up of the man's home in Belfast and taking four of his children out of employment there, where they were at the time earning fair wages, while in Dublin there was no demand for the work they were engaged in, and the man could not support himself and his family on the wages he would earn there. But that argument did not find much favour with the Recorder to whom it was presented. He found that it was reasonable that the man should accept employment in Dublin. The workman appealed to the Court of Appeal in Ireland, and his counsel again raised the question whether it was reasonable that the man should be required to go to Dublin to get employment, and urged that other matters might be considered besides the man's physical capacity. The Lord Chancellor in giving judgment said that there was evidence to support the Recorder's finding and that it could not be disturbed. It does not appear that the inconvenience of moving the children had any weight with the Court, and the whole case seems to have been treated as raising a question of fact.

I have come to the conclusion that we cannot take into account such matters as the state of the health of the workman's wife, or of his children's health or the lack of accommodation for wife or children, for these, when the Act is considered, are extraneous matters. The question is what the workman "is able to earn in a suitable employment or business." That must mean suitable to the workman as such; not suitable to a married workman, or to a workman with children, or to a devout workman, to put the case suggested by Scrutton L.J., but simply to a workman. The general tendency of the Act is towards this conclusion. Apart from the provisions relating to dependants, the Act is not concerned with the marital relations or paternal responsibilities of the workman, but only with his relation towards his employer. It is true that in *Ball* v. *William Hunt &*

(1) 46 Ir. L. T. 202.

Sons, Ld. (1) Lord Loreburn L.C. speaks of a physical defect which makes the workman's labour unsaleable in any market reasonably accessible to him; and the matter of accommodation for the workman himself was touched in *Pearson* v. *Archibald Russell, Ld.* (2); but neither that case nor *Beddard* v. *Stanton Ironworks Co.* (3), cited in that case, suggests any question of accommodation for the relatives or dependants of the workman. In short such authority as there is has regard, as might be expected, to the structure of the Act, and confines the question of the suitability of the employment to matters concerning the workman himself omitting all reference to other persons as extraneous. For these reasons I am of opinion that the learned county court judge was right in considering the matters he took into account and in rejecting those which he rejected, and that this appeal must be dismissed.

ROMER L.J. I agree. The question we have to decide, and the question which the learned county court judge had to decide, is whether the appellant is able to earn 2*l.* 6*s.* 9*d.* a week in a suitable employment. The appellant says he is not, and for two reasons only. The first is that Bradford and Sheffield, places where work is available, are not suitable for his wife to live in owing to the state of her health. The other reason is that at neither of those places can he find suitable accommodation for his wife and family. In my opinion neither of these matters can be taken into account, for this sufficient reason: the employer is bound to compensate the workman for loss of wages occasioned by an accident to the workman. In arriving at the amount of compensation payable regard can only be had to matters personal to the workman and relating to his capacity to work. To take into account such extraneous matters as the health of his wife and accommodation for his family would be to compel the employer to compensate the workman for loss of wages occasioned, not by the accident, but by the

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(1) [1912] A. C. 496, 499, 500.

(2) 1916 S. C. 536.

(3) (1913) 6 B. W. C. C. 627.

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unfortunate state of his wife's health and by the number and circumstances of his family. For these reasons I think the learned judge was right in refusing to take notice of the two matters upon which the appellant has relied, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *I. B. Pritchard.*

W. H. G.

Distinguished. SPEYSIDE ESTATE & TRUST CO., LTD. *v.* WRAYMOND FREEMAN (BLENDERS), LTD. [1949] 2 All E.R. 796.

Applied. SPEYSIDE ESTATE, ETC. *v.* WRAYMOND FREEMAN [1950] 1 Ch. 96

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1930
March 3.

GALE *v.* DENMAN PICTURE HOUSES, LIMITED.

[1930. G. 144.]

Discovery—Production of Documents before Delivery of Statement of Claim.

The Court will not, save in very exceptional circumstances, order a defendant to produce documents in his possession before the plaintiff has delivered his statement of claim.

APPEAL from chambers.

The plaintiff had been a director and controller of one of the departments of the defendant company. As director he had, by the articles of association, to hold shares therein of the nominal value of 500*l.* By the articles the office of director was to be vacated if he ceased to hold the requisite number of qualifying shares. The plaintiff held the requisite number of shares. Later, in view of a reorganization of the boards of directors of the Gaumont-British Picture Corporation and its subsidiary and allied companies, of which the defendant company was one, the plaintiff was asked to tender his resignation as a director of the defendant company. He declined to do so, and was informed later that as he no longer held the requisite qualifying shares in the defendant company—these having been exchanged for shares in the Gaumont-British Corporation, as stated in the company's minutes—he had ceased to be a director. The plaintiff said that the exchange of shares was agreed to on the understanding that the position of the directors was not to be jeopardized. His solicitors then asked the defendants for copies of the minutes relating to the exchange of shares, but the defendants' solicitors, in answer, wrote that if the plaintiff considered that he had a bona fide claim he could institute proceedings against the company, and then he would in the usual and proper way obtain discovery of the relevant documents. Thereupon the plaintiff issued a writ against the defendants claiming (1.) remuneration for services rendered; (2.) damages for wrongful dismissal; and (3.) damages for loss of his position as director of the defendants. After issuing his writ, and before he delivered his statement of claim, he applied on the summons for directions that the defendants do forthwith give him copies of their minutes relating to the exchange of shares. The Master made an order directing copies of those minutes to be supplied to the plaintiff, and that order was, with a slight variation, affirmed by MacKinnon J.

The defendants appealed.

St. John Field for the appellants. To give discovery before delivery of the statement of claim is contrary to the settled practice of the Court. The only known instance where it has been done was in an unreported decision of Stirling J. in *Magnus* v. *Plumbers Co.* (noted in Annual Practice, 1930, p. 487), but there is nothing to show upon what materials the order was there made.

[He was stopped.]

van den Berg for the respondent. Under Order XXXI., rr. 12 and 14, the Court has clearly jurisdiction to make the order that has been made in this case. It is true that such an order will rarely be made before delivery of the statement of claim, but this is an exceptional case where it is right that it should be made. The appellants admit the existence of the minutes in question; these are vital for the determination of the case; and the appellants' refusal to produce them is purely obstructive. The Rules of Court are intended to facilitate, and not to obstruct, justice, and should be so applied. If the minutes are not produced at this stage, the statement of claim, delivered before their production, will probably have to be amended when full discovery is obtained—a proceeding which will involve additional costs which should be avoided. There is no distinction in principle between this case and that in which Stirling J. made an order for the production of a document. In *Republic of Costa Rica* v. *Strousberg* (1) it is significant that Baggallay L.J. guarded himself against expressing any opinion that there is no right, under the Rules, to apply for the production of documents before the delivery of the statement of claim, and he added that he would desire an opportunity of considering whether he would take the same view on the subject as was taken by Bacon V.-C. in *Cashin* v. *Craddock.* (2)

SCRUTTON L.J. This is a daring experiment, but I am afraid I am too old to yield to Mr. van den Berg's entreaties. The appeal is against an order made by the Master and Judge ordering the production of documents before the statement of claim in the action has been delivered. Neither Lawrence L.J. nor I has ever known of such an order being made. I do not question for a moment that under the wide words of Order XXXI., rr. 12 and 14, there is power to make such an order, but equally I think that it should not be made unless in the most exceptional circumstances. A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a "fishing bill" to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, "Show me the documents which may be relevant, so that I may see whether I have a case or not," is a most undesirable proceeding.

In the present case the plaintiff, who apparently had been, but is not now, a director of the defendant company, has issued a writ claiming remuneration which he says is due to him for services rendered, damages for wrongful dismissal, and damages for loss of his position as a director of the

(1) (1879) 11 Ch. D. 323.

(2) (1876) 2 Ch. D. 140.

company. Presumably, if he says he has been wrongly dismissed he must know why. I gather that the suggestion is that he has lost his qualifying shares. Before he delivered his statement of claim he took out a summons, not supported by any affidavit, and before the defendants had made any affidavit, that the defendants do forthwith give him copies of certain minutes relating to the exchange of shares. Apparently no question of privilege nor any question of relevancy arises. In those circumstances the judge was called upon to decide, in the absence of any affidavit, and before the plaintiff had formulated his case in his statement of claim, what class of documents should be disclosed. Mr. van den Berg says that this is an exceptional case. I see nothing exceptional about it. It is the sort of plea advanced by a plaintiff who does not know precisely what his case is. A plaintiff claiming damages for wrongful dismissal and asking for discovery as in this case is in much the same position as a plaintiff suing for possession who should take out a summons asking his opponent to show him his documents of title. Although, as I have said, there may be jurisdiction to make this order, the jurisdiction should be exercised only in the rarest circumstances and where it is necessary to do justice. As I see nothing in the circumstances of this case to justify such an order being made, the appeal must be allowed and the order of the judge rescinded.

LAWRENCE L.J. I agree. The jurisdiction of the Court to order discovery at any stage of an action is undoubted, but it is the settled practice of the Court not to make such an order before the plaintiff has delivered his statement of claim, save under the most exceptional circumstances. In *Cashin* v. *Craddock* (1) Bacon V.-C., in refusing such an order, said, so long ago as the year 1876, that before he exercised such a jurisdiction he would have to be satisfied that the production asked for was essential to the statement of the plaintiff's claim, and that had not been shown. In the present case the plaintiff by his writ claims damages for having been

(1) 2 Ch. D. 140.

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wrongfully deprived of his office of director. Before delivering his statement of claim he applied for the production by the defendants of certain minutes of directors' meetings at which he had been present. I have listened in vain for any statement by counsel that the production of these minutes is essential to the statement of the plaintiff's claim. So far as I can see there is no difficulty in the way of the plaintiff stating his claim without the production of those minutes, though I appreciate that they may have an important bearing upon the question whether the claim is well founded or not. It may well be that after the statement of claim and the defence have been delivered, production of the minutes will not be resisted. At the proper stage of the action all documents relating to any matters in question will have to be discovered. I however deprecate the idea that a plaintiff, after issuing a writ and before delivering his statement of claim, can apply for discovery. This is entirely contrary to the practice, and such an application should be discouraged.

Appeal allowed.

Solicitors for appellants: *H. S. Wright & Webb.*
Solicitors for respondent: *Bartlett & Gluckstein.*

J. S. H.

LUIPAARD'S VLEI ESTATE AND GOLD MINING COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

K. B. D.
1929
Nov. 12, 13.
C. A.
1930
Feb. 5, 6.

Revenue—Income Tax—Debenture Interest—Payment out of accumulated undivided Profits taxed in previous Years—Profits Balance previously written off to meet Capital Loss—Whether Interest "payable wholly out of profits or gains brought into charge to tax"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 26.

The words "profits or gains brought into charge to tax" in rr. 19 and 20 of the All Schedules Rules to the Income Tax Act, 1918, mean profits or gains brought into charge to tax in the same year of assessment as the payment is made of the interest from which income tax is deducted.

A trading company wrote off against capital depreciation a balance of 68,929*l.* standing to the credit of its profit and loss account and representing accumulated past profits on which the company had paid income tax in previous years. During the years of charge the company made no profits, but it paid debenture interest, deducting from the payments tax at the standard rate which it claimed to retain on the ground that the 68,929*l.* was to be regarded as available for the payment of the interest, and that the interest was, therefore, "payable wholly out of profits or gains brought into charge to tax" within r. 19 of the All Schedules Rules under the Income Tax Act, 1918:—

Held, by Rowlatt J. and the Court of Appeal, that, as during each of the years of charge the company had no profits or gains brought into charge to income tax, the interest had not been paid out of money already brought into tax within the meaning of r. 19. The case, therefore, did not fall within r. 19, but within r. 21, by which the company must account to the Crown for the amount of the tax which it had deducted.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 17, 1928, the appellant company, the Luipaard's Vlei Estate and Gold Mining Company, Ld., appealed against assessments to income tax in the sums of 1005*l.*, 1851*l.*, 2467*l.*, and 589*l.* for the years ending April 5, 1924, April 5, 1925, April 5, 1926, and April 5, 1927, made on it under s. 26 of the Finance Act, 1927, and the Income Tax Acts.

On June 30, 1923, the appellant company's nominal share capital was 560,000*l.* 40,275*l.* 5½ per cent. debentures were

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outstanding out of an amount of 120,000*l.* originally issued. A reserve of 28,137*l.* appeared in the balance sheet and there was standing to the credit of the profit and loss account a sum of 68,929*l.* The profit and loss account balance represented an accumulation of past profits which had been assessed to, and on which the appellant company had paid, income tax in previous fiscal years. It had been treated both by the appellant company and the respondents as a fund available for the payment of debenture interest.

In November, 1923, capital loss suffered by the appellant company through depreciation of assets was ascertained on a valuation to be 474,675*l.* At an extraordinary general meeting of the appellant company on November 28, 1923, a resolution was passed reducing the share capital by 377,610*l.* from 560,000*l.* to 182,390*l.* The resolution was confirmed on December 14, 1923, and the reduction of capital was sanctioned by the Court on February 12, 1924. The balance of the loss of 474,675*l.* was then dealt with in the appellant company's accounts as follows: 28,137*l.* was written off the reserve account, reducing it to nil, and 68,929*l.* was written off the balance standing to the credit of the profit and loss account, reducing it to nil. Those two amounts, when added to the amount by which the share capital was reduced—namely, 377,610*l.*—equalled in round figures the amount of the capital loss suffered by the appellant company—namely, 474,675*l.*

The 5½ per cent. debentures issued by the appellant company, amounting originally to 120,000*l.*, had been progressively reduced by means of a sinking fund to the following amounts. At June 30, 1923, 40,275*l.*; 1924, 24,000*l.*; 1925, 23,925*l.*; 1926, 15,900*l.*; 1927, 7350*l.*; 1928, nil. In 1924 the appellant company created further debentures to the extent of 40,000*l.*, carrying interest at 6 per cent. During the year ending June 30, 1925, issues of those debentures were made totalling 30,000*l.* Interest on the outstanding 5½ per cent. debentures was payable half-yearly on September 30 and March 31, and on the 6 per cent. debentures on January 1 and June 30.

During the years material to the appeal, apart from a sum of 50*l.* war loan interest charged to income tax under

Case III. of Sch. D, the appellant company had no profits and gains brought into charge. For the years ending April 5, 1924, April 5, 1926, and April 5, 1927, the computation of the appellant company's profits under Case I. of Sch. D showed a loss. For the year ending April 5, 1925, an assessment under Case I. of Sch. D was made in the sum of 4835*l.*, but was discharged owing to a wear and tear allowance being due to the company of the same amount.

The dispute between the parties arose in connection with payments of debenture interest made after February 22, 1924. After that date the appellant company made payments of debenture interest and certain other interest, from which payments it deducted tax at the standard rate. The company claimed that it was entitled to retain the tax so deducted on the ground that, although the balance to the credit of its profit and loss account had been written off, the company must still be treated as having 68,929*l.* available as taxed profits for payment of the interest. That contention was not admitted, and assessments under r. 21 of the All Schedules Rules under the Income Tax Act, 1918 (1), as amended by s. 26 of the Finance Act, 1927, were made on the company as follows, in respect of payments of interest subsequently to February 22, 1924, from which tax had been deducted :—

Income Tax Year.	Payments made of interest from which tax deducted.	Total taxed profits of the Appellant Company.	Assessment.
	£	£	£
1923–24 ..	1055 ..	50 ..	1005
1924–25 ..	1901 ..	50 ..	1851
1925–26 ..	2517 ..	50 ..	2467
1926–27 ..	639 ..	50 ..	589

The Commissioners held that the debenture interest paid after February 22, 1924, was not paid out of "profits or gains brought into charge to tax" within r. 19 of the All Schedules Rules (1), and that the sum of 68,929*l.* was not available either for distribution as dividend or for payment of debenture interest as a result of its having been written off by the company. They, therefore, confirmed the assessments.

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(1) Rule 19 of the All Schedules Rules to the Income Tax Act, 1918, provides: "(1.) Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation

The company appealed.

Raymond Needham K.C. and *J. Millard Tucker* for the appellant company. The Commissioners were wrong. The debenture interest in question was payable, and was paid, by the company wholly out of its profits or gains which had been charged with tax and the company is entitled to retain out of the interest the amount of the tax thereon: Income Tax Act, 1918; All Schedules Rules, r. 19. (1) The fact that, in the books of the company, the 68,929*l.* was written off does not affect the question. The money was not disposed of by the company; it was merely dealt with by book entries for commercial reasons. The domestic operations of a company

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thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due."

Rule 21: "(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

"(2.)* Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person."

* As amended by s. 26 of the Finance Act, 1927.

(1) See note (1) post, p. 595.

have nothing to do with the income tax authorities. The position as regards liability to tax between the appellant company and the Crown has not been altered. The money still remains an asset available for the provision of debenture interest: *Stapley* v. *Read Bros., Ld.* (1) It also remains an accumulated profit which has been "brought into charge to tax" within the meaning of r. 19. The only effect of writing off the profit and loss balance was to render it not available for distribution by way of dividend, and that fact is immaterial. "Profits or gains brought into charge to tax" in r. 19 are not the actual profits or gains in the year of assessment, but the taxable profits or gains, or the profits or gains ascertained in accordance with the Income Tax Acts: per Lawrence L.J. in *A.-G.* v. *Metropolitan Water Board.* (2) They include an unexhausted balance of profits or gains brought into charge to tax in previous years. Although, in its origin, when it was intended to be merely a temporary imposition, income tax was a tax for the year only, and although a Finance Act is still enacted every year to give life to the code contained in the Income Tax Act, 1918 (the reason being that it is desirable that Parliament should keep control of finance), the Act of 1918 is full of provisions which involve the consideration of the income of a number of years. Any annual payment must, for the purposes of r. 19, be deemed to be payable wholly out of profits or gains brought into charge to tax if the amount of those profits or gains, together with the unexhausted balance of profits or gains brought into charge to tax in previous years, is greater than the amount of the annual payment and if, but for the provisions of r. 19, the annual payment is such as would be an admissible deduction in computing the profits or gains for the year in which the annual payment is made. The interest in the present case was an annual payment of this character. The Crown is not entitled to earmark a fund out of which debenture interest must be paid. On the other hand, a company may treat interest as having been paid out of any fund of profits or gains which have been brought into charge to tax and

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(1) [1924] 2 Ch. 1.

(2) [1928] 1 K. B. 833, 852.

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is in their hands and sufficient to cover the interest: per Warrington L.J. in *Sterling Trust, Ld.* v. *Inland Revenue Commissioners.* (1) It has been the practice of the Crown for many years to allow retention by the payer of interest of the amount of the tax in circumstances such as the present. Where legislation succeeds a continuous practice and repeats the very words on which that practice is founded, it may fairly be inferred that the Legislature has intended the words to be used in the meaning which they have received: per Lord Macnaghten in *Income Tax Special Commissioners* v. *Pemsel.* (2)

R. P. Hills (with him, *Sir William Jowitt A.-G.*) for the respondents. The Commissioners were right. The present case does not fall within r. 19. When the 68,929*l.* balance was written off, it was used by the appellant company for a definite purpose and it thereupon ceased to be available as a fund out of which dividends or debenture interest could be paid. "Profits or gains brought into charge to tax," in r. 19 means actual profits or gains brought into charge in the year in respect of which they are required for the payment of the interest: *A.-G.* v. *London County Council* (3); *Sugden* v. *Leeds Corporation* (4); *Dickson* v. *Hampstead Borough Council.* (5) In other words, r. 19 directs the collection of the tax in a certain way in the year and for the year. Income tax is essentially an annual tax. Sect. 1 of the Income Tax Act, 1918, in expressing the basic principle of the tax, provides that: "Where any Act enacts that income tax shall be charged *for any year* at any rate, the tax at that rate shall be charged *for that year* in respect" of the specified property and income. By Sch. D, 1 (*b*), tax is to be charged in respect of "all interest of money, annuities, and other *annual* profits or gains. . . ." See also *Bowles* v. *A.-G.*, per Parker J. (6); and *London County Council* v. *A.-G.* (7) Moreover, the language of r. 19 itself shows that, in determining what are the "profits or gains" referred to, no period can be considered other than that in respect of which the interest is payable. By the rule the profits or gains out of which the interest is payable must be assessed and charged to tax without distinguishing the interest. If there has been no assessment of the profits or gains of the year regarding which the interest is payable, the tax in respect of that interest cannot be assessed and charged without distinguishing the interest in question: see *London County Council* v. *A.-G.* (1) If that were not so, the period between the earning of the profits or gains and their use for payment of interest might be so long that the person liable to the interest might have paid tax on the undivided profits or gains at 1*s.* or 1*s.* 6*d.* in the 1*l.* and might seek to retain tax on the interest at 4*s.* in the 1*l.* It is inconsistent with the whole scheme of the Income Tax Act, 1918, that interest on debentures which were not created until 1924 should be paid out of profits earned before 1923. The rule applicable to the present case is r. 21, and the company is, therefore, liable to account to the Crown for the amount of the tax which it has deducted. The practice with regard to assessment in such cases as the present has varied, but, even if a practice has been followed by the Crown, the Court will not necessarily give effect to it.

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(1) (1925) 12 Tax Cas. 868, 886.

(2) [1891] A. C. 531, 591.

(3) [1907] A. C. 131.

(4) [1914] A. C. 483.

(5) (1927) 11 Tax Cas. 691.

(6) [1912] 1 Ch. 123, 132.

(7) [1901] A. C. 26, 37 et seq.

Raymond Needham K.C. replied.

ROWLATT J. For some years before the years of charge the appellant company possessed a fund of 68,929*l.* undivided profits or gains which had been brought into charge to tax in respect of the years in which they had been earned. In the years of charge the company, on paying debenture interest, deducted income tax thereon and claimed to withhold that tax from the Crown on the ground that the interest must be regarded as having been paid out of the 68,929*l.* and, therefore, paid out of "profits or gains brought into charge to tax" within r. 19 of the All Schedules Rules under the Income Tax Act, 1918. That contention is put forward, although the 68,929*l.* was brought into charge years previously when they were earned and have since been written off in the books of the company against capital depreciation. The Special Commissioners decided in favour of the Crown on the ground that in the years of charge the 68,929*l.* was not available for payment of debenture interest, it having been written off, and that the interest in question had not, therefore, been paid out of "profits or gains brought into charge to tax" within r. 19.

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(1) [1901] A. C. 26.

That matter, however, does not arise if it appears that the words in r. 19, "profits or gains brought into charge to tax," are confined to profits or gains brought into charge in the year in which the "yearly interest" is paid. Income tax is, of course, an annual tax, not only in the sense that it is annually imposed by the Finance Act, but also in the sense that it is annual in its structure and organization. As was pointed out by Parker J. in *Bowles* v. *A.-G.* (1), it was originally intended to be a temporary tax. Although it has become a permanent tax, it has remained annual in the sense that it is renewed every year. It was very strictly annual in its inception, and it was not only annual in its imposition, but it was also annual in its collection. The tax was assessed at a particular time of the year, appeals against assessments were disposed of at a particular time of the year, and the tax was for the service of the particular year. The profits on which the tax was to be levied were strictly on an annual basis, although they might be provisionally calculated under Sch. D on the income of the previous years. I say "provisionally" because, by s. 134 of the Income Tax Act, 1842, it was provided that where the profits fell short in the year of charge, the charge for income tax should be adjusted to the proper figure and the balance, if any, which had been overpaid, be repaid by the Crown. So far as the amount of the assessable income is concerned a great inroad has been made upon the annual principle, and in the last year or two the last vestige of s. 134 has disappeared. The result may be that a trader is taxed in any particular year on the profits of his trade, although there are no profits in that year at all. In the

(1) [1912] 1 Ch. 123, 132.

period of transition in which we now are a new company, which makes 10,000*l.* in its first year and nothing in the two succeeding years, has the 10,000*l.* used at least two and a half times for the purposes of taxation. The annual character of the tax has also been modified in another direction. Sect. 102 of the Act of 1842, which dealt with the deduction of income tax in a case like the present, enacted that the rate to be deducted was 7*d.* in the 1*l.*, the current rate of income tax for the payer of the interest, as well as for the receiver of it. The company or, as it was called in those days, the corporation, paid income tax on its profits and deducted the tax from the dividends or debenture interest which it paid, thus passing on the tax. But now there are varying rates of income tax, and the Income Tax Act, 1918, provides for the deduction of tax at rates which cannot produce with exactitude the tax which the payer has had to pay. Mr. Hills based an argument on that fact, but I disregard it, because what, I think, has taken place in this field has simply been a rough and ready adjustment necessary for the practical working of the scheme of the Act and is of no importance.

The question which I have to determine is: What are the "profits or gains brought into charge to tax" within the meaning of r. 19? There is no doubt that income tax has been laid upon this interest, by Sch. D, 1 (*b*), of the Income Tax Act, 1918. How is that tax to be assessed and collected? Interest which is payable out of profits or gains brought into charge to tax within the meaning of r. 19 is to be charged to tax by assessing or charging the whole of the profits or gains out of which it is payable without distinguishing the interest. Interest can only be assessed under r. 19 if it can be assessed on some profits or gains out of which it is payable. The tax on each proportionate part is then deducted and retained by the company. But in the present case there has been no assessment of profits or gains in the year of the assessment of the interest and, therefore, the tax on the interest cannot have been assessed indistinguishably within r. 19. It seems to me that, on the plain reading of these sections, this tax must be recovered under r. 21, which provides that the company, having deducted it from the payments of interest, has to account for it to the Crown.

Certain authorities have been cited to me, beginning with *London County Council* v. *A.-G.* (1), and continuing to *Sterling Trust, Ld.* v. *Inland Revenue Commissioners* (2), which establish that, if a sum is brought into charge out of which the interest is payable and that sum is available—I use that short expression to show that I allude to cases like *A.-G.* v. *London County Council* (3) and *Sugden* v. *Leeds Corporation* (4)—there is no need to inquire into what account the amount has been brought, or out of what back money it has been taken, but, if the fund is there and the interest has been paid, it is considered to have been paid out of the fund within the meaning of the rule. I cannot conceive that those cases give us any help in a case like the present where the inquiry is, not out of which of two funds the interest is to be treated as having been paid, but whether any fund exists which can be said to be "profits or gains brought into charge to tax," within r. 19. A case which is rather more embarrassing to me—although it is only a personal embarrassment—is *A.-G.* v. *Metropolitan Water Board* (5), where I gave a decision, which was affirmed by the Court of Appeal, regarding the position where there were profits or gains and payment of interest out of them in a particular year, but no assessment until the following year. In giving my decision, lightly agreeing with something which fell from Mr. Latter, who appeared for the Board, I said that profits or gains brought into charge in previous years and carried forward and used to pay interest in a later year would be none the less profits or gains brought into charge. (6) I had an idea that it was customary to treat the matter in that way. But what I said was only obiter in the strictest sense of the word. I think I was wrong, and I do not hold myself bound by it. I think the Court of Appeal took the view that I am now taking. Sargant L.J. said (7): "I think that the Attorney-General

(1) [1901] A. C. 26.
(2) 12 Tax Cas. 868.
(3) [1907] A. C. 131.
(4) [1914] A. C. 483.
(5) [1928] 1 K. B. 833.
(6) (1927) 13 Tax Cas. 294, 301.
(7) [1928] 1 K. B. 833, 847.

was right in his submission that, when once you have ascertained under the Income Tax Act, 1918, the annual value of the undertaking of the Board for the year 1922–23, you must use the basis of that value for the other purposes of income tax for that year." Those words actually cover the present case. Lawrence L.J. said (1): "In the circumstances I should have thought that it was not really open to doubt that the qualifying words 'brought into charge to tax' in the expression 'profits or gains brought into charge to tax' in r. 19 were inserted expressly to denote that the profits or gains there referred to were the profits or gains in respect of which a charge to income tax had been imposed on the appellants by virtue of the Act, that is to say, the taxable income and not the actual income." Later, he says (2): "In the result I have arrived at the conclusion that the expression 'profits or gains brought into charge to tax' in r. 19 means the taxable and not the actual profits or gains in the year of assessment."

Another point made was based on the fact that there has been to some extent a practice followed by the Crown in cases such as the present of allowing profits or gains which have been taxed in past years to be treated as brought into charge to tax in the year of the assessment of the interest. On this Mr. Needham referred me to a passage in Lord Macnaghten's speech in *Income Tax Special Commissioners* v. *Pemsel* (3), where he refers to the interpretation which had been, as a matter of usage, put on the word "charity," and the re-enactment of Income Tax Acts on the footing of that interpretation. In my view, however, there is nothing in this case so clear and concrete as the very clear, definite and specific state of affairs which Lord Macnaghten was considering. What has been done here, as I can quite understand, is that, where companies have made profits which are sometimes more and sometimes less than their debenture interest, the officers of the Revenue have not been careful to divide the profits into annual sections, but have treated them

(1) [1928] 1 K. B. 833, 850.
(2) [1928] 1 K. B. 852.
(3) [1891] A. C. 531, 591.

as being carried forward from year to year. In a proper case that would be a very reasonable thing to do, and so, perhaps, it has extended to where there are no profits at all. But I cannot see that there has been any customary interpretation of the words of r. 19 which Parliament must be considered as having adopted in passing the Income Tax Act, 1918.

I express no opinion regarding the effect of the writing off of this 68,929*l*. I think that it would be wrong to decide the case on that ground and thereby make relevant a consideration applying to all cases like this which I think is irrelevant. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

G. F. L. B.

The company appealed. The appeal was heard on February 5 and 6, 1930.

Raymond Needham K.C. and *J. Millard Tucker* for the appellant company.

Sir William Jowitt A.-G. and *R. P. Hills* for the respondents. The arguments used in the Court below were substantially repeated. The following additional authorities were referred to: *Great Western Ry. Co.* v. *Bater* (1); *British Insulated and Helsby Cables* v. *Atherton* (2); *Inland Revenue Commissioners* v. *Dalgety & Co.* (3)

LORD HANWORTH M.R. In this case the Luipaard's Vlei and Gold Mining Company, Ld., appeals from a decision of Rowlatt J., who confirmed the assessments made upon it for the years 1924 to 1927. The appellant company was incorporated on April 10, 1896, and is a company mining a gold mine.

It appears that in the year 1923 it was realized that a severe capital loss had been suffered by the appellant company through the depreciation of its fixed assets, and the amount of that depreciation was as much as 474,675*l*. By the time that year had been reached it had accumulated from past profits a sum of 68,929*l.* That is upon what is called in the Case a commercial basis, but if what are called the principles of the Income Tax Acts had been applied the balance would have been, at that date, a sum of 99,584*l.* I do not think it material to emphasize the distinction between those two amounts. From the commercial point of view the profits accumulated were a sum of 68,929*l.* When in 1923 it was found that the company had suffered this severe capital loss, an extraordinary general meeting of the company was held in order to deal with the situation, and at that meeting it was resolved to reduce the share capital by writing 16*s.* a share off the 1*l.* shares. That gave a sum of 377,610*l.* for setting off against this depreciation of assets of nearly 475,000*l.* But it will be observed that it fell short by something like 97,000*l.* of meeting the situation, and so resort was had to the sum of 68,929*l.* representing accumulations of past profits. If the company had not brought that figure into the accounts, and employed it to reduce this depreciation, it would have been compelled to write down its shares, not merely by 16*s.*, but by something like 19*s.*, leaving the shares 1*s.* and not 4*s.* shares. But, probably by a very wise and prudent system of finance, the company made use of this sum accumulated from past profits, and so it was that it was only necessary to write down the shares by 16s. to meet the depreciation of fixed assets. When that had been done, the company was able to go on trading. In the course of the trading it had to pay interest on its debentures, and it continued to do so from 1923 onwards. The assessment that is made upon the company is for the years 1924 to 1927.

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(1) [1922] 2 A. C. 1.

(2) [1926] A. C. 205.

(3) [1930] 1 K. B. 1.

The company says that the sum of 68,929*l.*, which was brought into account for the purpose of reducing its capital loss, ought to be treated as still existent for income tax purposes, and in particular for the purpose of r. 19, sub-r. 1, of the All Schedules Rules. The reason why it makes that claim is that under that rule a company that has made payments of interest to debenture holders out of money that has been brought into charge for income tax and has deducted from those payments, as it is required to do, sums in respect of income tax, is entitled to reimburse itself out of the deductions for the payments it has already made in respect of income tax. And this company says that as this sum of 68,929*l.* consists of accumulated profits, which had paid income tax, according to law, in the several years in which they were earned, it is entitled to treat the debenture interest paid in the years of charge, 1924 to 1927, as paid out of that sum which had already been brought into charge for income tax, and therefore to retain the sums deducted from the interest in respect of tax as reimbursement for what was paid at the time or times when the 68,929*l.* was accumulated; and the company relies on the fact that the 68,929*l.* would have been a larger sum if it had not been depleted by payments of tax. The question that comes to be determined, therefore, is: Is the company entitled to take into account the 68,929*l.* as a sum on which payment of income tax has been duly made, although at some distance in the past, and to use that as part of its existing funds for the purpose of the relief or right which is given to a company or other person paying an annual sum under r. 19, sub-r. 1?

The Attorney-General has quite rightly stated that income tax is an annual tax. It is imposed by an annual Act. Unless the annual Act was passed, the powers in relation to income tax would lie dormant. Income tax, although now brought into operation year by year, and for a year, was not always an annual tax or for one year only. The Act of 1842 granted the duties for three years, and the Act of 1853 imposed the tax for seven years. It is useful to look at s. 59 of the Act of 1853, which said: "This Act shall commence and take effect from and after the fifth day of April one thousand eight hundred and fifty-three, and . . . . shall continue in force until the sixth day of April one thousand eight hundred and sixty, and no longer"—and then follows a proviso: "Provided always, that this Act and the said duties shall not then cease with respect to any assessment which ought to have been made before the said last-mentioned day, but which shall not then have been made and completed. . . . ." A contrast between the Acts of 1842 and 1853 and the present system and several successive Acts that have been passed, emphasizes the point that income tax is now charged as an annual tax, year by year, and not for longer. It is quite true that there is machinery, as there was in the Act of 1853, for dealing with matters which had not been cleared up in the period for which the Act operated; and the Act of 1918 gives the powers, and prescribes the method under which the income tax is to be collected if and when that Act, with such amendments as may be made, is brought into operation by the passing of a Finance Act in each year. The tax, however, remains a tax for a year, for the financial twelve months, repeated (one may say unhappily) in every successive twelve months, but not the less a tax which is imposed for twelve months only.

At the end of the Schedules and the Cases, and Rules severally applicable to the Schedules, there are a number of general rules applicable to the Schedules A, B, C, D and E, and, among them, is the rule in question. Rule 19 says: "Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity or annual payment, without distinguishing the same." I pause there for a moment. It is quite clear that the purpose of that rule is to impose the duty of collecting the tax upon the person who is making the payment, and it provides definitely that "no assessment shall be made upon the person entitled to such interest, annuity or annual payment," and that is the interest or annual payment which is "payable wholly out of profits or gains brought into charge to tax." That duty of collection, under r. 19, is imposed upon the person who has to make the payment of the interest or annual payment. Rule 19 was originally found in s. 102 of the Income Tax Act, 1842, and s. 40 of the Income Tax Act of 1853, and r. 21 is derived from s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. In *London County Council* v. *A.-G.* (1) Lord Macnaghten says of that duty imposed, as it was, by the Act of 1888: "It is no longer optional for a person who has to make an annual payment to deduct income tax. He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty." Rules 19 and 21 have reimposed the general duty there emphasised by Lord Macnaghten and previously imposed by the three statutes to which I have referred. It is a duty imposed upon the person who makes the payment, and at the same time it prevents any assessment from being made upon the person entitled to such interest. The rule goes on: "But the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due" —then there is a provision that the deduction shall be allowed as if it were an actual payment. When that rule is contrasted with r. 21 it appears that if the money out of which the payment is made has already been brought into charge to tax, then there is no account to be rendered by the person paying the money, for he has already made a payment to the Crown of the sum which he has collected or will collect from the payee. On the other hand, under r. 21, if he has not made any such payment, then he has to render an account to the Crown, and I stand by the words which I used in *A.-G.* v.

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(1) [1901] A. C. 26, 40.

Metropolitan Water Board (1) where I said: "There is in my judgment good ground for the Attorney-General's argument that in r. 19 the words 'payable wholly out of profits or gains brought into charge to tax' do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid. So that in an account between the Crown, the appellants, as tax collectors for the Crown, and the stockholders, it would be clearly seen that the sum deducted from the payments to the stockholders was passed on to and reached the Crown." In other words, it appears to me that what is contemplated as being stopped from payment over to the payee is the sum of tax for which both the payer and the payee are liable under the Finance Act for the year. Rule 19 presupposes that the payer and payee are both liable to pay the tax, and that the payee might have been assessed to the tax if the method of assessment had prevailed in his case. The rule does not take into account matters of which the payee may, at a later stage, take advantage, such as that his total income is below the standard of liability, or that he would be entitled to some deduction of tax, with the result that he may be able to establish a right to repayment. It is dealing with the annual tax; I do not say a tax necessarily paid in the twelve months, for some adjustment may be necessary, because the date of the payment to the payee may fall outside the income tax year; but the rule does contemplate a liability of the payer and a prima facie liability of the payee to the same tax. That is the interpretation which I think is to be placed upon r. 19 with its corresponding or ancillary rule, r. 21.

Now in the present case what is it that is suggested? It is that by reason of the fact that at some time, under some different Finance Acts, some tax has been paid to the Crown in respect of the accumulated profits of 68,929*l.*, the company may take advantage of that historical fact in the several years from 1924 to 1927, and may pray in aid those payments made some years before, and claim for that reason to retain the sums deducted in the course of its duty under r. 19. I do not find any justification for that course. It appears to me that r. 19 contemplates that the liability of the payer and payee is in respect of the same tax, and that r. 19 imposes a duty upon the payer which is not intended to inure to his profit unless the terms of the rule are complied with and justify his reimbursing himself what he has paid in respect of the tax to which both he and the payee have become liable.

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(1) [1928] 1 K. B. 833, 843.

Lord Hanworth M.R.

On the second point, it appears, upon the facts of this case, that the 68,929*l.* has been finally and irrevocably capitalized, and so as to disentitle the company ever afterwards from restoring them to reserve and from dealing with them as profits. But in view of the fact that there may be cases in which that final destination of these accumulated profits is not so clear, I prefer to base my judgment upon the interpretation to be placed upon rr. 19 and 21, and to hold that the conditions do not prevail in this case which justify the retention by the company in its hands of money deducted from payments of interest made by it.

I agree with the construction that Rowlatt J. has put upon the rules themselves, and I do not think that the immunity sought by the company can be rightly claimed in this case. For these reasons the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. The solution of the first question in this case turns upon the true meaning of the expression "profits or gains brought into charge" contained in the sentence "is payable wholly out of profits or gains brought into charge to tax" in r. 19 of the All Schedules Rules to the Act of 1918. In my opinion, the Attorney-General is right in describing the Income Tax Act, 1918, as a "Finance Clauses Act." It has been said over and over again that income tax is a tax for the year only. What that means is explained by Parker J. in *Bowles* v. *A.-G.* (1) He there states (2): "It is desirable to consider the history

(1) [1912] 1 Ch. 123. (2) [1912] 1 Ch. 132.

of the income tax as well as the precise terms of the statutory provisions in question. It appears certain that the income tax was originally imposed as, and was intended to be, a temporary tax only, and the Acts regulating its collection have always been so drawn as to expire automatically (except as to arrears) at the end of the period of such imposition. If reimposed at the end of this period, the Acts were revived and continued by the Act reimposing the tax, but again only for the period of reimposition." As the Master of the Rolls has already explained, for a very long time past the Finance Acts have been annual Acts, and have only imposed the tax for the period of one year, and hence the expression that income tax is income tax for a year.

Now if you take as an example the first of the years in question in this case, the year 1923 to 1924, that was governed by the Finance Act, 1923, and s. 14, sub-s. 1, of that Act reading it so far as it is material, is this: "Income tax for the year 1923–24 shall be charged at the rate of four shillings and sixpence." It then deals with super-tax, but that is immaterial, and then sub-s. 2: "All such enactments relating to income tax . . . . as were in force with respect to the duties of income tax . . . . granted for the year 1922–23 shall . . . . have full force and effect with respect to the duties of income tax . . . . granted by this Act." The effect of that is that the Act of 1918 and all its provisions, including those contained in the Schedules, must be read as if they had been re-enacted by the Act of 1923 with regard to the income tax imposed by that Act. The result of construing them in that way is that in r. 19 the expression "profits or gains brought into charge to tax" must necessarily mean the profits and gains brought into charge to tax for 1923–24. Sect. 1 of the Act of 1918 is: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." Then, in order to collect the tax so charged, s. 2 provides that : "Every assessment and charge to tax shall be made for a year commencing on the sixth day of April and ending on the following fifth day of April, except where under the provisions of this Act weekly wage-earners are to be assessed and charged half-yearly."

Treating these sections as having been re-enacted for the year 1923–24 and as only applicable to that year we get to this, that the only relevant charge to tax within the meaning of the expression "profits or gains brought into charge" in r. 19 is the charge to the tax of 4*s*. 6*d*. imposed by the Act of 1923 for the year 1923–24 with the result that the company paying interest to its debenture holders during that year can only retain the income tax which it has deducted in so far as that income tax is covered by the income tax paid by the company in respect of its profits and gains brought into charge to tax in the same year. I ventured to express the same opinion in *A.-G.* v. *Metropolitan Water Board* (1), which opinion, I think, agreed with that expressed by Sargant L.J. I appreciate the comment made by Mr. Needham, that it was not really necessary in that case to deal with the precise question which has arisen in this case. It was sufficient in that case to decide that the actual income of the year of assessment was income which would not be brought into charge to tax until the following year, but my judgment in that case was undoubtedly based on the view (which I adhere to) that the charge referred to in r. 19 is the charge for the year of assessment only. I there stated (2), and desire now to repeat, that the expression "profits or gains brought into charge to tax" in r. 19 means "profits or gains brought into charge to tax in the year of assessment," and that "it follows that under the provisions of rr. 19 and 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year."

(1) [1928] 1 K. B. 833. (2) [1928] 1 K.B. 852.

Sargant L.J. (1), after referring to the opinions of Lord Macnaghten and Lord Davey in *London County Council* v. *A.-G.* (2), states that: "It is impossible to read the judgments in that case, and particularly those of Lord Macnaghten and Lord Davey (3), without observing that attention is throughout directed to the actual sums paid in or for the year of assessment," and a little later he states (4) that the attitude adopted by the Metropolitan Water Board is in his judgment inconsistent with the view of the legislation so clearly recognized that in making these deductions, the taxpayer is acting merely as the tax collector for the Crown and that "If that is so, it is strange that his obligation to pay what he has collected should be cancelled to any extent exceeding his actual payment of income tax (including an accrued obligation to pay) for the same period." In view of the opinion thus expressed, and of my own opinion, I think that the first point fails, and that the learned judge came to the right conclusion. As this disposes of the appeal I prefer not to express any concluded opinion on the second point though, as at present advised, I agree with what the Master of the Rolls has said about it.

GREER L.J. I agree that this appeal should be dismissed, and if it were not for the fact that it seems to me desirable to give such authority as can be given by a judgment of one member of the Court to the convincing argument put forward by the Attorney-General on behalf of the Crown, I should not have added any words of my own. But I think it is desirable to accentuate, by reference to the sections of the Act of 1918 and the words of the imposing statute—the Finance Act which imposes the tax—the view that what both the incorporating statute and the incorporated statute are dealing with when they refer to tax is the tax imposed by the Finance Act for the particular year. In my view the meaning of the word "tax," wherever it occurs in the Income Tax Act, 1918, apart from questions as to the effect

(1) [1928] 1 K. B. 833, 848.
(2) [1901] A. C. 26.
(3) [1901] A. C. 39, 40, 42, 45, 46.
(4) [1928] 1 K. B. 833, 849.

C. A.
1930

LUIPAARD'S VLEI ESTATE AND GOLD MINING CO. v. INLAND REVENUE COMMISSIONERS.

Greer L.J.

of any context, is the income tax imposed by the particular Finance Act; it has no reference to any tax except a tax imposed by the Finance Act, which is the Act putting the obligation upon the taxpayer to pay the tax. When I look at the words in r. 19 which we have to construe—namely, "profits or gains brought into charge to tax" and the words of r. 21 referring to the payment of the tax not being out of "profits or gains brought into charge to tax"—I think that expression has reference only to such profits and gains as are brought into charge to the tax imposed by the Finance Act for the particular year with regard to which the question arises. If that is right, that disposes entirely of the first point made in the argument for the company.

With regard to the second point, at one period of the argument it seemed to me to put in the way of the company a greater difficulty than the first point. I am not satisfied that that prima facie view was right, and inasmuch as the question may, some day, arise, when the profits made in the year of tax are used by a company for the purpose of transferring them to capital account, whether it is entitled to have regard to those for the purposes of the deductions permitted under rr. 19 and 21, I think it better in this case to express no opinion on that point.

Appeal dismissed.

Solicitors for appellant company: *Julius, Edwards & Julius.*

Solicitors for respondents: *Solicitor of Inland Revenue.*

W. I. C.

GOUGH'S GARAGES, LIMITED *v.* PUGSLEY.

1930

March 4, 5.

Landlord and Tenant—Lease to Company—Right to New Lease—Request to Landlord—"Prescribed Form"—Rules of Court—Ultra vires—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5—*County Court* (*Landlord and Tenant*) *Rules*, 1928, *Order* L.B, *r.* 2.

Debenture constituting Floating Charge—Appointment of Receiver—Action by Receiver in Name of Company to enforce Grant of New Lease—Subsequent Liquidation of Company—Right of Receiver to continue Action.

A company was the lessee of certain premises under a lease expiring on June 24, 1930. In 1925 the company issued a debenture by which it charged all its undertaking and all its property, present and future, including its uncalled capital in favour of the debenture holders. On April 22, 1929, the company gave notice to the landlords under s. 5 of the Landlord and Tenant Act, 1927, requiring them to grant to it a new lease of the premises. In July, 1929, the debenture holders in exercise of the power on that behalf in the debenture appointed a receiver of the property and assets therein comprised. The landlords having failed to comply with the company's request for the grant of a new lease the receiver on September 23, 1929, commenced an action in the county court in the name of the company to obtain the grant of a new lease. On October 15 a compulsory order was made to wind up the company and a liquidator was appointed. At the hearing in the county court preliminary objections were taken on behalf of the landlords: (1.) That an order having been made to wind up the company the receiver could no longer continue the action, and (2.) that the notice by the company requiring the grant of a new lease was not in the "form prescribed" by r. 2 of Order L.B of the County Court (Landlord and Tenant) Rules, 1928.

The county court judge upheld the preliminary objections.

On appeal:—

Held (1.), that the right to apply for a renewal of the lease under s. 5 of the Act of 1927 was a right given by the company to the debenture holders as part of their security, and that the receiver was entitled to enforce that right notwithstanding the liquidation of the company.

(2.) That s. 5 of the Act did not require that the notice of claim for a new lease should be in any prescribed form, and therefore that Order L.B, r. 2, so far as it required that the notice should be in a prescribed form was ultra vires.

APPEAL from Bristol County Court.

By a lease dated March 31, 1923, certain premises known as Nos. 10 and 12 Marsh Street, Bristol, were demised by Joseph Pugsley to George Albert Gough for a term of seven years expiring on June 24, 1930, at an annual rent of 200*l.* per annum.

On November 2, 1925, the premises were assigned by Gough to Gough's Garages, Ld. (hereinafter called "the company").

On December 30, 1925, the company issued a debenture by which it charged "its undertaking and all its property present and future including its uncalled capital" to secure the money due to the debenture holders. Condition 1 of the debenture provided as follows: "This debenture is intended to rank as a first charge on the property hereby charged, and such charge is to be as regards the company's land at Bristol and all other the freehold, leasehold and copyhold property for the time being of the company a specific charge and as regards all other the property and assets of the company a floating security." The debenture provided that at any time after the principal moneys became due the debenture holders might appoint a receiver, and that the receiver so appointed should have power "to take possession of, collect and get in the property charged by this debenture and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient."

On April 22, 1929, the company's then solicitors gave notice, under s. 5 of the Landlord and Tenant Act, 1927, to the executors of Joseph Pugsley, who had since died, requiring them to grant the company a new lease of the premises. The notice was in the following form :—

"re Nos. 10 and 12 Marsh Street, Bristol.

"As solicitors and agents for and on behalf of Messrs. Gough's Garages, Ld., whose registered office is situate at No. 10 Broad Quay, Bristol, we hereby give you notice that in pursuance of section 5 of the Landlord and Tenant Act, 1927, the said Gough's Garages, Ltd., require you to grant to them a new lease of the above premises for a term of fourteen years to commence from the 25th day of June, 1930, on the grounds specified in the above-mentioned section of the said Act."

The notice was duly received and acknowledged by the solicitors of the executors on April 23, 1929.

1930

GOUGH'S GARAGES, LD. v. PUGSLEY.

In July, 1929, the debenture holders, in exercise of the power in the debenture deed, appointed a receiver of the property comprised in the deed.

The executors having failed to comply with the notice of April 22, 1929, the receiver in the name of the company on September 23, 1929, commenced proceedings in the Bristol County Court to obtain a grant of a new tenancy of the premises.

On September 27, 1929, a petition was presented in the High Court to wind up the company, and on October 15 a compulsory order was made and a liquidator appointed.

At the hearing in the county court preliminary objections were taken on behalf of landlords (1.) that, an order having been made to wind up the company, the receiver could not continue the action; and (2.) that the notice requiring a new lease to be granted was not in the "prescribed form" as required by r. 2 of Order L.B of the County Court (Landlord and Tenant) Rules, 1928.

The county court judge upheld the preliminary objections and dismissed the action.

The receiver appealed. The appeal was heard before Greer and Romer L.JJ., sitting as additional judges of the King's Bench Division, on March 4 and 5, 1930.

H. S. G. Buckmaster and *R. F. Lyne* for the appellant. As regards the first objection, that the action was not properly constituted having regard to the fact that an order had been made to wind up the company, it is submitted that when the action was commenced the receiver was the proper plaintiff and that the subsequent order to wind up the company cannot deprive the parties interested in the lease of the benefit given them by s. 5 of the Act. Under the debenture the right to require a new lease was assigned by the company to the debenture holders, and it would be wrong therefore for the Court to hold that the existence of a winding-up order should deprive them of that right. The receiver was therefore entitled to bring the action and to continue it in the name of the company.

As regards the second objection, that the notice requiring a new lease was not in the "prescribed" form, it is to be observed that whereas under s. 4 of the Act of 1927 a "claim" for compensation has to be made in the "prescribed manner," nothing is said in s. 5 as to the notice therein referred to requiring it to be made in any particular form. On a strict construction of the two sections, it is submitted, the notice under s. 5 is something different from the "claim" under s. 4 and accordingly the persons giving the notice are entitled to the benefit which that distinction offers. It is true that under the County Court (Landlord and Tenant) Rules, 1928, Order L.B, r. 2, sub-r. 1 (*a*) (1), it is provided that a "claim" for compensation or a new lease has to state the "trade or business carried on upon the holding"; but that rule must be construed as applying to a "claim" and not to a "notice," because under s. 25 of the Act it is only in relation to something "prescribed" that the County Court Rules can be made, and in s. 5 of the Act of 1927 "prescribed" does not appear in relation to the "notice" therein mentioned.

[They were stopped.]

Rayner Goddard, K.C. and *E. H. C. Wethered* for the respondents. It is submitted that the only person who could apply for the renewal of the lease was the liquidator. The authority of the receiver to apply in the name of the company for a lease was determined on the making of the winding-up order: *In re Henry Pound, Son & Hutchins* (1); *Thomas* v. *Todd.* (2) The tenant here was the company and the receiver could only ask for a new lease in the name of the company. The receiver appointed by the debenture holders was only attorney for very limited purposes. The right of the company to require a new lease is a new right given by the Act of 1927 and does not fall within the assets and debts which the receiver is empowered to get in. The power in the debenture does not authorize the receiver to accept leases. The winding up of the company terminated the authority of the receiver to act as agent for the company: *Gaskell* v. *Gosling* (3). See also *Yonge* v. *Toynbee.* (4) The liquidator is now the only person who can give authority to bring an action in the name of the company.

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(1) The County Court (Landlord and Tenant) Rules, 1928, Order L.B, provide:—

1: "In this Order 'The Act' means the Landlord and Tenant Act, 1927."

2: "(1.) A claim under the Act for compensation in respect of any improvement or for goodwill or for a new lease in lieu of compensation for goodwill or by a mesne landlord under s. 8, sub-s. 1, of the Act shall be made in writing signed by the claimant, his solicitor or agent and shall state the name and address of the claimant and of the landlord against whom the claim is made and shall contain —

"(*a*) A description of the holding in respect of which the claim arises and of the trade or business carried on upon the holding.

"(*b*) A concise statement of the nature of the claim.

"(*c*) If the claim arises in respect of an improvement, particulars of the improvement including the date whereon the improvement was completed and the cost thereof; and

"(*d*) If compensation is claimed, a statement of the amount claimed."

[ROMER L.J. *Gaskell* v. *Gosling* (3) shows that the liquidation of the company put an end to the authority of the receiver to act as agent for the company but that did not affect the powers given him by the debenture deed.]

The receiver cannot bring actions in the name of the company after the commencement of the winding up, for by so doing he would be pledging the assets of the company for costs.

On the question as to the form of notice, a tenant has only a right to a new lease under s. 5 of the Act of 1927 where he has a right to compensation under s. 4. In considering whether he has a right under s. 5, ss. 4 and 5 must be read together. It must first be seen whether he is entitled to compensation under s. 4; and then to entitle him to a new lease under s. 5, it is not enough for him merely to allege that compensation under s. 4 is not sufficient, but he must give a concise account of the circumstances, showing that compensation will not sufficiently compensate him for disturbance. Under s. 5, sub.-s. 7, the landlord may sell his interest to the tenant. Unless the tenant can bring himself within the provisions of s. 4 his claim under s. 5 must fail. Sect. 6, which enables the landlord to offer alternative accommodation to the tenant in lieu of compensation shows that the landlord is entitled to at least as much information under s. 5 as under s. 4. In a case like the present it is necessary that the landlord should have information as to the nature of the case which the tenant is setting up.

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(1) (1889) 42 Ch. D. 402, 421.

(2) [1926] 2 K. B. 511, 516.

(3) [1896] 1 Q. B. 669.

(4) [1910] 1 K. B. 215.

Buckmaster was not called upon to reply.

GREER, L.J. This appeal raises a question of some importance under the new Landlord and Tenant Act. The appellant company was the lessee of a garage under a lease which would expire on June 24, 1930. The company apart from the rights which it had granted to debenture holders applied to claim such advantages as the recent statute gives to tenants. But the company had issued a debenture and the debenture holders appointed a receiver in July, 1929, and, thereafter, the receiver took possession of the premises. He then made a claim under the Act in the name of the company for a new lease of the premises. That claim was made on September 23, in the form of an action in the county court commenced on that date. We are told, though it does not seem to have been proved before the county court judge, that the receiver sold the company's rights of which he was receiver in the existing lease to purchasers. I do not take that as a ground of decision because we are told it is not proved, but only as an illustration of what might happen to show that the receiver's rights to apply to the Court for a new lease were rights which were or might be valuable to the debenture holders whom he represented, or rather at whose instance he was appointed receiver, and thereby made an agent of the company.

On September 27 a petition was presented to wind up the company and on October 15 a compulsory order was made. The action was brought in the county court and came on for hearing. Two preliminary points were then taken: first, that the winding-up order made it impossible for the company through the receiver to proceed with the action; and secondly, that the action could not go on and the judge could not give any decision upon the point because the claim which was required by s. 5 of the Landlord and Tenant Act, 1927, had not been made in the prescribed manner before the action was brought. With regard to the first point it seems to me that it ought not to have succeeded. A debenture is given to creditors in order that they may have a security. It is a floating security until there is some kind of default and a receiver is appointed, and the rights under the debenture are actually put in some way into execution by the appointment of a receiver. But the receiver under his debenture has certain powers. In this case, among other powers, he has the power "to take possession of, collect and get in the property charged by this debenture and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient." That right to take proceedings, was just as much a security for the debt as any other rights given by the debenture. I should not be disposed to put too narrow an interpretation on the word "property." After all, property in law consists of rights. The complete property in any chattel consists of the right to the possession and use of that chattel. But a right of any kind, such as a right to a chose in action, is property which may be pledged to debenture holders just as any other kind of property. It does not matter whether the property in question was in existence in the hands of the company granting the debenture at the time when the debenture was given, or whether it came into existence by the operation of a subsequent Act of Parliament. It seems to me that to deprive the debenture holders of a right, under the part of the debenture that I have mentioned, to realize a valuable right of the company, because the company has gone into liquidation, is to nullify one of the valuable rights given to the receiver by the debenture.

I think, for these reasons, the learned judge was wrong in finding that the action was not properly constituted. It was properly brought by the receiver for the debenture holders in the name of the company. If the defendant landlords thought it was a hardship their remedy was to say: "This company is in liquidation. If this action is to go on, we must have security for costs in case we succeed in the action."

The other point raised is one of some difficulty having regard to the rule which has been passed by the Rule Committee of the county courts and the Rule Committee of the High Court with reference to proceedings under this Act. Sect. 4, sub-s. 1, of the Act which provides for compensation for loss of goodwill is as follows: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i.) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii.) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto." It is plain from its words that that sub-section has nothing whatever to do with any application for a lease, but has reference only to an application for compensation for loss of goodwill. Before that application can be made, the statute provides in express terms that a claim must be made in the prescribed manner. If the claim is made in the prescribed manner, as prescribed by Rules of Court, then an action must be brought in order to obtain a decision of the tribunal in question whether there should be compensation for loss of goodwill.

Then s. 5 provides that instead of asking for compensation for goodwill a tenant may, if he alleges that compensation would not be adequate to compensate him for his losses in respect of his goodwill, claim a new lease. Sub-s. 1 of that section is in these words: "Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him." That sub-section expressly avoids imposing upon the tenant the same condition as is imposed upon him by s. 4 when he is asking for compensation for goodwill—namely, the condition that he shall first make a claim in the prescribed manner. All that the sub-section requires is that he shall allege that though he would be entitled to compensation, the compensation would not be sufficient. If he alleges that and proves that he has sent the landlord a notice requiring a new lease, then he is in a position to make a claim before the tribunal. I do not see how any Rule Committee is entitled to add to the conditions provided by s. 5 a further condition that the tenant should at first make a claim in the prescribed manner. It seems to me that the matter is made even clearer when one considers the terms of s. 6 of the Act which provides: "The tenant shall not be entitled to compensation under s. 4 of this Act or to a new lease under s. 5 thereof if within one month after the tenant has made a claim under s. 4, sub-s. 1, or served a notice under s. 5, sub-s. 1, the landlord serves on the tenant notice that he is willing to grant to the tenant at such rent and for such term as the tribunal may consider reasonable a tenancy of other premises which, in the opinion of the tribunal, would reasonably preserve to the tenant the goodwill of his business." There a direct contrast is drawn between the claim which has to be made under sub-s. 1 of s. 4 and the notice that has to be served under sub-s. 1 of s. 5. Sect. 6 provides whether the action be for compensation after a proper claim has been made or by action for a new lease after proper notice has been given that this alternative solution of the difficulty is given to the landlord in either case. It seems to me, if one considers the words of the section alone, it is not right to say that ss. 4 and 5 should be read together so that the provisions as to the conditions applicable to a claim under s. 4 are equally applicable to a claim under s. 5.

The matter would, I think, have been free from difficulty except for the rules that have been passed by the County Court Rules Committee. These rules (Order L.B) provide (r. 2) that a claim under the Act "for compensation in respect of any improvement or for goodwill or for a new lease in lieu of compensation for goodwill or by a mesne landlord under s. 8, sub-s. 1, of the Act shall be made in writing signed by the claimant, his solicitor or agent," and shall contain certain particulars. That does purport to put upon the claimant for a new lease the obligation before the proceedings in the county court are commenced to make a claim in the same manner as he would have to make it if he were claiming compensation. In my judgment that rule adds something to the Act of Parliament which the County Court Rules Committee are not given power to do. It is legislation not as to the procedure of the county court, but as to what the rights of the tenants are. Those responsible for the drawing up of the Rules for county courts (and the same applies as regards Rules for the High Court) have a right to bind all persons in matters of practice and procedure, but they have no power, in my judgment, to clog the statutory right with any condition which is not imposed upon it by the statute. In so far as this r. 2 of Order L.B puts a clog on the claim of the tenant to a new lease, which is additional to that which is contained in the Act of Parliament, I think, it is ultra vires and void.

For these reasons I am of opinion that the claim of the receiver in the name of the company before the county court was not subject to the objections that the learned judge thought it was and the case must be remitted to him for a new trial; that is to say, it must be remitted to be heard on its merits. I do not say what will happen to it on its merits. I can very well imagine that good reasons can be urged why a new lease should not be granted in the circumstances which we have here, but that is for the tribunal to decide and not for us. As to the costs before the tribunal, I think we have nothing to do with them, and that that matter must be determined by the tribunal, but with regard to the costs here, I think the respondents ought to pay the costs of the appeal.

Romer L.J. I agree. By the debenture the company charged in respect of the money due to the debenture holders, "its undertaking and all its property, present and future, including its uncalled capital." I think those words "uncalled capital" are by themselves sufficient to show that the property included in the charge consists of every asset of the company. But that is made still more clear by the first of the conditions which is indorsed upon the debenture which provides as follows: "This debenture is intended to rank as a first charge on the property hereby charged, and such charge is to be as regards the company's land at Bristol, and all other the freehold, leasehold and copyhold property for the time being of the company a specific charge, and as regards all other the property and assets of the company a floating security." The debenture therefore is a first charge upon all the asets of the company. Among the assets of the company was the valuable right attaching to the company as a tenant under the lease of Nos. 10 and 12, Marsh Street, Bristol, to obtain compensation, or a new lease in lieu of compensation, under s. 4 and s. 5 of the Landlord and Tenant Act, 1927. That is, therefore, a right which is charged in favour of the debenture holders and forms part of their security. The debenture provided that at any time after the principal moneys became due the debenture holders might appoint a receiver, and the receiver so appointed should have power "to take possession of, collect, and get in the property charged by this debenture, and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient." That clause would therefore empower the receiver duly appointed by the debenture holders to take the necessary proceedings for the purpose of obtaining a new lease in lieu of compensation in respect of which new lease the company had already given notice to the lessors on April 22, 1929.

In pursuance of that power, the receiver commenced these proceedings in the county court and rightly commenced them in the name of the company. When the company was ordered to be wound up by the Court, as it was by an order dated October 15, 1929, that right which had been given by contract to the debenture holders of, among other things, taking proceedings to obtain this new lease in the name of the company was in nowise affected. It is perfectly true (and it has been laid down over and over again) that where, as happened in this case, the debenture or trust deed securing the debentures contains the usual clause, that the receiver appointed under the deed shall be deemed to be the agent of the company, that the winding up of the company, or the compulsory liquidation of the company puts an end to the agency. But it does not put an end in any way to the powers of the receiver. In my opinion, when this liquidation order was made, the right of the receiver to proceed in the name of the company in the county court was in nowise affected.

The other point, the point arising under the Landlord and Tenant Act, 1927, is in my opinion concluded by the words of the Act itself. Sect. 4 of the Act seems to contemplate, and does in terms contemplate, a claim being made by the tenant followed by an application to the tribunal only in case the landlord does not agree the amount of compensation. Sect. 5 of the Act enacts that the tenant may make a claim in the first instance by serving a notice, and that having served such notice an application to the tribunal shall follow either by the landlord or by the tenant. Sect. 4 in terms provides that the claim shall be made in the prescribed manner. Sect. 5 says nothing about the form of the notice. But that the word "notice" in s. 5 of the Act does not mean the same as the word "claim" in s. 4 is, I think, made reasonably clear by s. 6, which says that after a tenant has made a claim under s. 4 or served a notice under s. 5 certain things shall happen.

Pausing there it appears to me that a notice under s. 5 need not be in any particular form. Unfortunately the rules for the county courts made under the Act (Order L.B) provide (r. 2), that: "A claim under the Act for compensation in respect of any improvement or for goodwill or for a new lease in lieu of compensation for goodwill . . . . shall be made in writing signed by the claimant . . . . and shall contain," and then it prescribes what the claim shall contain. I do not know whether the framers of these rules intended by the word "claim" to include a "notice" under s. 5 or whether they were directing their attention to a subsequent claim made before the tribunal, but assuming that they intended to include in the word "claim" a notice under s. 5 I am of opinion that the rule is to that extent ultra vires. The power to make rules, except in so far as the county court is expressly empowered to prescribe the form of claim under s. 4 is contained in s. 21 of the Act. That section which is defining the tribunal for the purposes of the Act, which in general is the county court, but in some cases may be the High Court, says this in sub-s. 5, "county court rules may be made for regulating proceedings under this section." "This section" is the one dealing with the tribunal, and the proceedings before that tribunal. The only power, therefore, to make rules was to make rules in reference to proceedings before the tribunal and gave no power at all, in my judgment, to make a rule in respect of the form of the notice to be served under s. 5, which notice would precede any proceedings before the tribunal and would not form a part of those proceedings themselves.

For these reasons I agree that the case must go back to the county court with the consequences which my Lord has indicated.

Appeal allowed and case remitted to county court.

Solicitors for appellants: *Woodcock Ryland & Parker, for Meade-King & Co., Bristol.*

Solicitors for respondents: *Middleton, Lewis & Clarke, for James Inskip & Son, Bristol.*

W. I. C.

C. A.

1930

March 14, 17, 28.

BLAY *v.* POLLARD AND MORRIS.

[1929. B. 2428.]

Contract—Mistake as to Contents of Document—Non est factum—Rectification.

P. and M., who had been partners as garage proprietors, agreed to dissolve the partnership as from March 4, 1929, on the terms, as was found, that M. should take over all liabilities of the firm incurred after March 4. P. informed his father, who was a solicitor, of the dissolution of the partnership, and the father prepared a written agreement to carry it out. By this document M. was made liable to indemnify P. in respect of all rent due before March 4. This agreement was handed to M., who was asked to read it, and he looked through it and signed it, although he said he could not understand it. On a claim by P. to be indemnified in accordance with the written agreement in respect of rent accrued due before March 4, M. pleaded that he signed the agreement under the belief that it embodied the oral agreement of March 4, that it was drawn up under a mutual mistake of fact, and that the only agreement arrived at was that M. should indemnify P. to the extent agreed upon orally. Fraud was not pleaded, nor was rectification claimed in the pleadings.

At the trial MacKinnon J. found that M. signed the agreement handed to him with practically no consideration of its terms, and that as a stipulation had been inserted therein which he had not orally agreed to, that term could not be relied upon, and, accordingly, that the written agreement must be rectified to make it conform to the oral agreement.

P. appealed.

Held (allowing the appeal), (1.) that as M. knew that the agreement which he signed was an agreement for the dissolution of the partnership between him and P., it was not open to him, in the absence of fraud or misrepresentation by P. as to the legal effect of the document, to rely on the plea of non est factum merely because if he had carefully read and understood the document he would have objected to one of its terms as not in accordance with the oral agreement; (2.) that in the absence of any allegation of fraud or conduct amounting to fraud, and in the absence of any claim for rectification, it was not open to the judge to rectify the written agreement; and (3.) that there was no evidence of mutual mistake.

Per Scrutton L.J. Cases must be decided on the issues on the record. If it is desired to raise other issues they must be placed on the record by amendment.

Appeal from a decision of MacKinnon J.

In an action by the plaintiff against the two defendants for arrears of rent, and in which he obtained judgment, the defendant Pollard served a notice upon the defendant Morris claiming to be indemnified by him against the plaintiff's claim under a written agreement dated April 20, 1929, and made between Pollard and Morris in the following circumstances. The two defendants entered into partnership in 1927 as garage proprietors, and carried on that business for some time in the premises let to them by the plaintiff Blay. On March 4, 1929, Pollard & Morris orally agreed to dissolve the partnership as from that date on the terms, as the judge found, that Morris should take over all liabilities incurred after March 4. Pollard informed his father, who was a solicitor, of the dissolution of the partnership with Morris, and the father then prepared an agreement in writing by the terms of which Morris was liable to indemnify Pollard in respect of all arrears of rent. The agreement in this form was handed to Morris, who was asked to read it, and Morris, who was totally unversed in business, looked through it and signed it, although he said he could not understand it.

To Pollard's claim to be indemnified in accordance with the written agreement of April 20, 1929, Morris pleaded that that agreement was intended to embody the oral agreement of March 4, which was the only agreement made between Pollard and Morris; that the alleged written agreement was signed under the belief that it embodied the said oral agreement; that it was drawn up and signed under a mutual mistake of fact; and that Morris only agreed to indemnify Pollard to the extent agreed upon orally. Fraud was not pleaded, nor was rectification of the agreement claimed.

At the trial MacKinnon J. found that on March 4 the parties orally agreed that Morris should assume liability only as from that date, and that there was no agreement between them that Morris should assume liability for rent due and unpaid on March 4. He further found that Morris signed the agreement of April 20 with practically no consideration of its terms, and in those circumstances he held that the case fell within the principle that if one party reduces to writing a bargain that has been made, and inserts therein a stipulation which he knows the other party did not intend to promise, the first party is not entitled to rely upon that stipulation, but must submit to have the whole agreement cancelled or have it rectified so as to carry out the true bargain. The judge accordingly rectified the written agreement so as to make it conform to the oral agreement come to on March 4.

Pollard appealed.

Hon. S. O. Henn Collins for the appellant. Although the judge said that he did not wish to use the word "fraud," he has in substance found fraud, but as fraud was not pleaded it was not open to him to find it. Nor was there any evidence of fraud.

[SCRUTTON L.J. Can the plea of non est factum be set up in support of the judgment?]

That plea is not open to the respondent, inasmuch as he executed the document with the intention that all that preceded his signature should be taken to be his act. In order to become bound by a contract in writing it is sufficient that the person signing it knows the nature of the document; it is not necessary that he should know all the terms it contains. He must be taken to give consent to make it his act in the law whatever it contains: per Buckley L.J. in *Carlisle & Cumberland Banking Co.* v. *Bragg*. (1)

If by a mistake common to both parties the document fails to express their intention, the Court may rectify it. Here there is no evidence of a common mistake. If by a mistake of one of the parties the document fails to express his intention and the mistake is caused by the fraud of the other party, the innocent party may put the other to his election either to accept rectification or to submit to rescission of the document. But in no other case will the Court alter a document because of a unilateral mistake and then decree specific performance: see per Farwell J. in *May* v. *Platt*. (2) Moreover, there was no claim for rectification of the agreement put forward on behalf of the respondent. It was therefore not open to the judge to order rectification.

[He also cited *Fowler* v. *Fowler*. (3)]

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(1) [1911] 1 K. B. 489, 495. (2) [1900] 1 Ch. 616, 623.
(3) (1859) 4 De G. & J. 250.

Tristram Beresford for the respondent. Apart from the question of common mistake, the judgment of MacKinnon J. can be supported by the plea of non est factum. *Foster* v. *Mackinnon* (1) is a very similar case to the present.

[SLESSER L.J. There was fraud in that case.]

Here it is enough for me to say that the respondent's signature to the agreement was obtained by what was in reality a misrepresentation of the nature of the agreement arrived at on March 4. The respondent's mind did not go with the document he signed. In those circumstances the judge was entitled to rectify the document to make it conform to the real agreement of the parties. In Anson on Contracts, 16th ed., p. 176, it is said that "the power of the Court of Chancery in former times, possessed now by all the Divisions of the High Court, to rectify deeds or written instruments was as a rule reserved for cases where the parties had agreed and the terms of the agreement, by fault of neither, failed to express their meaning." That accurately states the law, and enabled the judge to rectify the document: see also Fry on Specific Performance, § 792.

Hon. S. O. Henn Collins in reply. There was no misrepresentation as to the contents of the document which the respondent was asked to sign. All that the appellant's solicitor did was to say to the respondent "Here is the agreement which embodies what I am informed you orally agreed to on March 4." The respondent was under no misapprehension as to the nature of the document he was asked to sign; he is therefore bound by it.

Cur. adv. vult.

March 28. The following judgments were read:—

SCRUTTON L.J. A landlord sued two young men Pollard and Morris, who were carrying on a garage as partners on insufficient capital, for three quarters' rent in arrear, and obtained judgment against them both. Pollard then claimed by third party procedure indemnity against Morris. The indemnity was claimed under an agreement for dissolution of partnership dated April 20, 1929. While this agreement was couched in language which a young man with little knowledge of business might not understand, it was not seriously disputed that unless the agreement could in some way be invalidated, Morris was bound by it to indemnify Pollard against claims for rent accrued before the partnership was dissolved.

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(1) (1869) L. R. 4 C. P. 704.

Three ways of escaping the agreement were suggested. First, it was said that it was not Morris's agreement: non est factum. Morris said it was presented to him by Pollard's father, a solicitor, as an agreement dissolving the partnership, that he tried to read it, but could not make head or tail of it, and he never had agreed to indemnify Pollard for rent before the dissolution. The trial judge is not satisfied that the past rent was mentioned specifically in the oral agreement between Pollard and Morris, but finds that the oral agreement between them only related to future rent. But Morris did sign an agreement making himself liable for past rent. He knew it was an agreement for dissolution of partnership, and took the benefit of some of the terms contained in it, though after reading it he did not appreciate all its effect. The principle of *Foster* v. *Mackinnon* (1) as to the defence of non est factum is thus stated by Byles J. (2): "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended." See also *Carlisle and Cumberland Banking Co.* v. *Bragg*. (3) But where the signer knows the class of document he is signing—a dissolution agreement—though he does not understand or even read its exact terms, Farwell L.J. in *Howatson* v. *Webb* (1) states the law thus: "Warrington J. has expressed my view of the law thus (2): 'If a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of non est factum, to show that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him'—*Hunter* v. *Walters* (3)—'did not fall.'" As a general rule mistake as to the legal effect of what you are signing, when you have read the document, does not avail: see per Lord Romilly M.R. in *Powell* v. *Smith.* (4) It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect. For these reasons, in my opinion, the defence of non est factum, if pleaded, cannot succeed.

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(1) L. R. 4 C. P. 704.

(2) L. R. 4 C. P. 711.

(3) [1911] 1 K. B. 489.

The second defence is that acted on by the trial judge, based on § 792 of Fry on Specific Performance. That section reads thus: "It equally follows that the mistake of one party to a contract can never be a ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first. The error of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention." See also per Farwell J. in *May* v. *Platt.* (5) This rests on unilateral mistake in one party, fraud or conduct equivalent to fraud in the other party.

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(1) [1908] 1 Ch. 1, 3.

(2) [1907] 1 Ch. 547, 548.

(3) (1871) L. R. 7 Ch. 75.

(4) (1872) L. R. 14 Eq. 85.

(5) [1900] 1 Ch. 616, 623.

But no fraud is alleged in the pleadings; no application to amend has been made; and I cannot think a judge should find fraud or conduct amounting to fraud when it has never been pleaded. Further, I cannot see any evidence to justify the judge's finding that Pollard senior knew that there was no agreement as to past rent. The judge also rectified the agreement signed, although rectification was not claimed on the pleadings. This defence also fails.

Lastly, mutual mistake was alleged, not as a ground for rectification, but as a defence. But (1.) I see no evidence of any mutual mistake, and (2.) the mutual mistake pleaded was never proved, and if proved, was quite irrelevant. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

All the defences to the agreement therefore fail, and judgment must be entered for Pollard against the third party for the indemnity claimed.

I regret that Mr. Pollard the elder did not insist on Morris taking the agreement to his solicitor. I hope Mr. Pollard himself now regrets it. I have considered whether this should make any difference to the costs, but I do not think it is sufficient to influence them. The judgment against Morris must be with costs here and below. As, however, neither young Pollard nor Morris appears to have any money, neither the judgment for rent nor the judgment for indemnity and costs appears to be of much practical value.

GREER L.J. This appeal raises the question whether MacKinnon J. was right in deciding that the defendant Pollard was not entitled, in third party proceedings which he brought against his co-defendant Morris, to be indemnified against payment of the rent of certain premises which had been adjudged in the action to be due from the two defendants to the plaintiff, their landlord. Without question both defendants were liable on the judgment obtained by the landlord, but in the third party proceedings the question had to be determined whether under an agreement of dissolution signed by both parties the defendant Morris was liable to indemnify the defendant Pollard.

The facts as found by the learned judge, who heard the witnesses and by whose opinion as to the credit to be attached to their evidence we ought to hold ourselves bound, are as follows. The learned judge held that on March 4, 1929, the two defendants, who had been in partnership as garage proprietors, agreed to dissolve partnership. The evidence of the two defendants as to the terms differed. The learned judge accepted the evidence of Morris and refused to accept the evidence of Pollard. He held that the only agreement arrived at between the two partners was that the partnership should be dissolved on the terms that Pollard should be paid the sum of 50*l.* and that the other defendant Morris should take over the liabilities as from March 4, including the liability to perform the obligations of the lease after that date, but that there was no agreement that the defendant Morris should accept alone the existing liabilities to the landlord for rent already accrued due. The defendant Pollard asked his father, who was a solicitor, to draw up the agreement. This gentleman either inadvertently without knowledge of all the verbal terms which had been arranged, or intentionally, notwithstanding such knowledge, drew up the written agreement of April 20, 1929, under which the defendant Morris undertook to indemnify the defendant Pollard against all liabilities in any wise arising out of the said lease.

The judgment of MacKinnon J. for the respondent was based on the rule that any party to an agreement knowing that the other party is only signing it upon the assumption that it is in accordance with a previous agreement, and knowing that it is not in accordance therewith, cannot take advantage of the document so signed by the other party. There were in this case three possible arguments for the respondent to put forward for consideration—first, that the agreement was not binding, as it was not his agreement, that is to say, he might raise the

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defence of non est factum; secondly, it was open to him to raise a defence similar to that which is referred to in Anson on Contract, 16th ed., p. 173, an instance of which is provided by *Smith* v. *Hughes* (1); and thirdly, it was open to him to contend that by reason of a common mistake of the two parties to the agreement the agreement was drawn up in a manner inconsistent with their common intention, and ought therefore to be rectified and treated as rectified on the principle mentioned in § 787 of Fry on Specific Performance, and acted upon in *Murray* v. *Parker* (2) and other cases.

In my judgment the respondent was unable to establish any one of these contentions. As regards the first, it seems to me quite plain that the facts did not establish any defence such as is covered by the plea of non est factum. Morris executed the document knowing that it was an agreement for the purpose of dealing with the rights of the two partners on a dissolution of partnership, and it is not open to him to say that it was not his deed merely because if he had read it and understood it he would have objected to one of its terms as not in accordance with the verbal agreement which it was intended to carry out: see *Howatson* v. *Webb.* (3)

As regards the second contention, I think the learned judge was not entitled to consider this, as it involved, if the facts raised it at all, a charge of fraud against one of the parties, and it is absolutely essential that where a charge of fraud is made by one of the parties to litigation against the other it should be raised with particularity. No amendment of the pleadings was asked for, and no amendment was in fact made. On the pleadings as they stand I think the learned judge was not entitled to consider the application of what I may call the principle of *Smith* v. *Hughes* (1) to the present case.

I think also that the third point fails. It is true that the learned judge did not definitely decide that the appellant was aware of the mistake, but only said that in his judgment it was highly doubtful whether he was. It seems to me, however, quite impossible to suppose that if the appellant had been asked whether the presence of the obnoxious clause in the deed carried out his intention he would have been bound to say yes, because he had given evidence that the oral agreement was to the same effect. Therefore it does not seem to be right that this Court should hold that the agreement was drawn up in a form inconsistent with the common intention of both parties. I think it was a case of unilateral mistake, which by reason of the state of the pleadings cannot be relied on for the purposes of rectification or rescission.

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(1) (1871) L. R. 6 Q. B. 597.
(2) (1854) 19 Beav. 305.
(3) [1908] 1 Ch. 1.

For these reasons I think the appeal must be allowed.

SLESSER L.J. This is an appeal in an action in which there were originally two issues.

In the first issue George Blay, the landlord of certain property on which garages have been erected, called the Cannon Hill Garages, at Raynes Park, Surrey, obtained a judgment against two defendants, Basil Sydney Pollard and Norman Gascoigne Morris, who were joint tenants, for rent due.

The second issue between the two defendants, raised under a third party order of July 10, 1929, from the result of which this appeal is brought, was determined by MacKinnon J. in a judgment that the defendant Morris, the third party, was liable to indemnify the defendant Pollard against so much of the sum due as represented rent from March 4, 1929, to June 30, 1929, but that as to so much of the sum due as represented rent before March 4, 1929, the period for which liability is now in dispute, Pollard and Morris were liable in equal shares.

The defendant Pollard asks that the judgment as between him and the defendant Morris be set aside, and that judgment be entered for him for the relief claimed by him in the third party proceedings—namely, for a complete indemnification for the whole period during which rent is due and for judgment for the amount which may be found due from him to the plaintiff.

The history of the relations between Morris and Pollard, so far as it is material to the determination of this case, is as

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follows: The learned judge has found that both Pollard and Morris are very young men without any business experience. On December 24, 1927, they jointly took a lease of certain lock-up garages from Mr. Blay at a rent of 275*l.* per annum. Their combined capital, at the time of their taking possession of the property, was 70*l.*, and, by March, 1929, they owed the landlord two quarters' rent and another quarter would fall due on Lady Day. They had 40*l.* in the bank and some tools of slight value. On March 4, 1929, Morris and Pollard orally agreed to end the partnership as from that date. The learned judge has found that the agreement was that Morris should take over the liabilities of the partnership as from that date, and that he alone, for the future, would be responsible to the landlord for the rent, and that Pollard should retire from the business, and that Morris should pay him 50*l.* by instalments at such times as he could manage. On the matter really now in dispute—the liability for rent before March 4, 1929—the learned judge has come to the conclusion that there was no oral agreement on March 4 or at any other time that Morris should assume the whole liability for the rent already due and unpaid to the landlord up to March 4. It is not necessary, on this appeal, more closely to consider the evidence on which the learned judge came to hold that no oral agreement to pay the rent due up to March 4 was come to at that date. I content myself by saying that, in my opinion, there was evidence on which the learned judge could properly arrive at that conclusion.

On April 17 the landlord, Mr. Blay, sent a statement of account to Messrs. Pollard & Morris showing 206*l.* 5*s.* rent due to June 30 next, the then present quarter being payable in advance, and on April 2 Morris wrote to Mr. Blay in the name of the firm that it was utterly impossible for them to discharge the balance of rent due. He proceeded to make certain alternative suggestions. On April 18 it appears that Pollard had informed his father, Mr. Sydney Pollard, that he had dissolved partnership with Morris, and Mr. Pollard senior proceeded to prepare an agreement in writing, which at the trial he suggested was based upon what his son had told him had been arranged on March 4, and took it to the garage, where Pollard junior and Morris were present. On the finding of the learned judge that the agreement of March 4 contained no terms as to liability for rent up to March 4, it is impossible in my view to hold that the agreement which Mr. Pollard senior drew up did in fact represent the oral agreement come to on March 4. The written agreement, which is dated April 20, signed by Pollard junior and by Morris, and witnessed by Mr. Pollard senior, contains, among other things, the following terms: "The lease . . . . of the garage situate and being at First Way Raynes Park in the county of Surrey shall be taken over by the said Norman Gascoigne Morris (to whom the said Basil Sydney Pollard shall release his interest therein) as from March 4, 1929, in consideration of his undertaking all liabilities thereunder and indemnifying the said Basil Sydney Pollard therefrom."

This written agreement would, if it stood alone, make Morris liable to indemnify his partner Pollard junior for the arrears of rent, and, consequently, entitle the appellant to succeed in this appeal. The real question to be decided is whether, having regard to this finding of the learned judge that the term of the agreement for dissolution of partnership as to arrears of rent which is in the written agreement of April 20, 1929, was not in the oral agreement of March 4, and to other circumstances to which I shall refer, the Court should hold that Morris is not bound by the written agreement of April 20, 1929, which he undoubtedly signed. The statement of claim against the third party relies upon the agreement of April 20, and the defence, after stating that the oral agreement did not include an indemnity for past rent (a fact found in favour of the defendant), goes on to allege, in para. 4, that "the agreement sued upon was prepared by the [appellant's] father and was intended to embody the said oral agreement—which was the only agreement—and was signed by the defendants Pollard and Morris in the belief that it embodied the said agreement," and that it was drawn up and signed, so far as any indemnity was given by the terms of it, under a "mutual mistake of fact." The mutual mistake of fact, particulars of which were subsequently given, was that "neither the defendant Pollard nor the defendant Morris, at the time of the signature of the alleged agreement, knew that the rent was or might be alleged to be owing to the plaintiff."

Before considering the grounds upon which the learned judge has found in favour of the third party as to the indemnity for arrears of rent, I would say that I am quite unable to understand, in the circumstances, how a mutual mistake as to possible liability for rent could vitiate or call for a rectification of the written agreement. In fact no evidence of such a mutual mistake was adduced, nor does the learned judge base his judgment upon any such mutual mistake. No other allegation of mistake was relied upon in the pleadings. But the defence, as I read it, has another limb, in which it is further stated that "the third party never agreed to indemnify the defendant in respect of the matters alleged." It is upon this latter defence that the learned judge appears to have founded his judgment. The learned judge has found that Mr. Pollard senior, who was a solicitor, approached Morris with this formal legal document knowing that he, Morris, was totally unversed in business and not a very clever young man; that Mr. Pollard did not suggest to Mr. Morris that he should go and see Mr. de Fonblanque, Morris's solicitor, and have his assistance, and that when the document was handed to Morris he was asked to read it through, and made a pretence of doing so, but that in fact he signed the document with practically no consideration of its terms.

The learned judge has then proceeded to treat the written contract as rectified by limiting the liability to that accruing from March 4, which, in effect, is a decision in favour of Morris on the third party issue. He appears, however, without authority, as I think, to rectify on the ground of misrepresentation or fraud. He says that he does not wish to use the disagreeable word "fraud," but finds that Mr. Pollard senior knew that the written document was imposing new liabilities, though he also knew that in March the parties had not orally agreed to such liabilities, and that Mr. Pollard senior drew the document of April 20 with the intention that the new liabilities should be added. I do not think that the ground on which he comes to his conclusion—namely, to quote his words, "that the case falls within the principle that where one party reduces to written terms a bargain that has been made, and inserts in those terms a stipulation which he knows the other party did not intend to promise he is not entitled to take advantage of that mistake of the other party"—can be supported, for a finding that Mr. Pollard senior inserted into the written terms a stipulation which he knew Morris did not intend to promise amounts, if such a finding is to result in rectification or avoidance on the ground of unilateral mistake, to a finding of misrepresentation as to the effect of the document or of fraud. But no such a finding is stated in terms, and, in any event, the supposed misrepresentation was made not by Pollard junior, the signatory, but by Mr. Pollard senior; there is no finding of connivance or knowledge of Pollard junior. Under Order XIX., r. 6, in all cases in which the party pleading relies on any misrepresentation or fraud, particulars shall be stated in the pleadings. Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts: per Thesiger L.J. in *Davy* v. *Garrett*. (1) A charge of fraud or misrepresentation must be pleaded with the utmost particularity.

It was further attempted in this appeal to set up a defence of non est factum, though the learned judge does not appear to have relied upon any such plea. This defence may be raised where the deed signed is of a nature different from what it is represented to be, so that it was of an entirely different legal category, in which case, in contemplation of law, it may be said that the signatory never did sign it. In the old plea the pleader said "that the alleged deed is not his deed": see Bullen & Leake, 3rd ed., p. 467. In this case the agreement is admittedly known to be one of dissolution of partnership: at most one term differs from the signatory's intention;

(1) (1878) 7 Ch. D. 473, 489.

there is no misunderstanding as to the nature of the document itself. In such a case non est factum cannot be pleaded. In *Jervis* v. *Berridge* (1) Lord Selborne L.C. makes the distinction clear. He says (2): "The written document signed by the plaintiffs . . . . was not . . . . a contract valid and operative between the parties, but omitting (designedly or otherwise) some particular term which had been verbally agreed upon"—here we have the converse—"but was a mere piece of machinery . . . . as subsidiary to and for the purposes of the verbal and only real agreement": see also *Howatson* v. *Webb* (3) and cases there cited.

The case therefore rests in this way: the agreement to pay the arrears is, on the face of it, binding on Morris; the defences of mistake (as pleaded), fraud and non est factum alike fail; and in the result this appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Sydney R. Pollard.*
Solicitor for respondent: *John B. de Fonblanque.*

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(1) (1873) L. R. 8 Ch. 351.
(2) L. R. 8 Ch. 359.
(3) [1908] 1 Ch. 1.

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Workmen's Compensation—Industrial Disease—Cataract—Inclusion by Order of Secretary of State—Order limiting Period of Compensation—" Modification "—Ultra vires—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 3—*Workmen's Compensation* (*Industrial Diseases*) *Consolidation Order*, 1929, *paras.* 1 *and* 3.

By s. 43 of the Workmen's Compensation Act, 1925, a right to compensation in respect of disablement arising from the industrial diseases specified in Sch. III. is conferred as if the disease was a personal injury by accident arising out of and in the course of the employment. Sub-s. 3 gives the Secretary of State power to " make Orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order."

The Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. 1, extends the provisions of s. 43 of the Act, " subject to the modifications hereinafter specified " to (inter alia) cataract caused by exposure to rays from molten or red-hot metal.

Para. 3 of the Order provides : " A person suffering from cataract shall not be entitled to compensation under the provisions of the said section on account of that disease for more than six months in all, or for more than four months unless he has undergone an operation for cataract. Provided that where the judge, committee or arbitrator is satisfied on the advice of the Medical Referee that an operation could not for medical reasons be performed within four months from the date of disablement, or that having undergone an operation, the worker is still disabled by the cataract after the expiration of six months from such date, compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct, without prejudice, however, to the right of review conferred by s. 11 of the Act " :—

Held, that para. 3 was a " modification " within the meaning of s. 43, sub-s. 3, of the Act, and was not therefore ultra vires.

APPEAL from an award of the judge of the county court of Pontypool sitting as arbitrator under the Workmen's Compensation Act, 1925.

The following statement of the facts is taken from the judgment of the Master of the Rolls :—

In this case the workman suffered from a cataract caused by exposure to rays from molten or red-hot metal, and on December 7, 1927, he obtained a certificate of the certifying surgeon to that effect within the meaning of the Workmen's Compensation Act, 1925, and the Orders made thereunder. The certificate was in the following terms: "Frederick Leonard on the 7th day of December, 1927, is suffering from cataract caused by exposure to rays from molten or red-hot metal being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed." The workman was thereupon paid by his employers full compensation down to October 8, 1928. On that date he returned to work of a light character and was receiving the sum of 1*l.* 19*s.* 1*d.* a week. On April 25, 1929, he claimed to have an award made in his favour on the ground that he was totally incapacitated for work as a result of the cataract, from December 7, 1927, up to October 8, 1928, when he had sufficiently recovered from the said cataract to commence suitable light work provided by the employers, which he continued to do until December 22, 1928, when he had to cease work. In January and in May of 1928 he had had two successive operations for cataract. In the answer put in by the employers they denied liability, denied that the workman had been incapacitated from October 8, 1928, when, as I say, he returned to work and was given light work by his employers, and they also said that: "In the event of the judge being satisfied on the advice of the medical referee that the worker has been totally incapacitated as mentioned in para. (*a*) the respondents will contend that the applicant is only entitled to compensation for a definite and limited period to be fixed by the judge."

The hearing of the arbitration took place on May 22, 1929. When it had proceeded it was found that the question of what was the condition of the man was both relevant and important, and thereupon the learned judge framed certain questions which were submitted to a medical referee. The referee made his reply on June 7, 1929, answering the first question, whether or not the workman was disabled, in the affirmative, and the second question, what was the incapacity, as follows: "In part, as the right eye is not a perfect eye, but has an error of hyperopia and astigmatism, which causes a strain for this eye to see sharply without a glass, and this strain is more pronounced now he has only one eye to use instead of two. The irritability of the left eye to heat, also affects the right eye." That certificate of the medical referee was made in consequence of the examination of the workman which he had made on June 7. On July 17 the learned judge resumed the hearing of the case, reserved judgment, and finally made his award on August 21, 1929. The effect of the award is that the respondents should pay to the applicant a weekly sum of 1*l.* 2*s.* 7*d.* as compensation for personal injury caused to him on December 7, 1927, by disease, such weekly payment to commence as from October 8, 1928, and to continue until December 15, 1928. That is for ten weeks. Inasmuch as those dates were then long past, the award further ordered that the sum so due should be paid at once, and dealt with the costs. From that award the appeal is taken to this Court by and on behalf of the workman, and a cross notice of appeal is served by the employers.

The appeal and cross-appeal were heard on December 2 and 3, 1929.

The only matter calling for a report is that arising on the workman's appeal—namely, whether the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, made by the Secretary of State under s. 43, sub-s. 3, of the Workmen's Compensation Act, 1925, was ultra vires so far as it gave power to the county court judge to limit the payments to be made and the duration of such payments in the case of incapacity arising from cataract caused by exposure to rays from molten or red-hot metal, which is made an industrial disease within the Act by the Order.

The Order (so far as material) provides :—

(1.) Subject to the modifications hereinafter specified the provisions of s. 43 of the Workmen's Compensation Act, 1925, shall extend and apply to the diseases, injuries, and processes, specified in the first and second columns of the Schedule annexed to this Order, as if the said diseases and injuries were included in the first column of the Third

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Schedule to the Act, and (where processes are specified in the second column of the annexed Schedule) as if the said processes were set opposite in the second column of the Schedule to the Act to the diseases or injuries to which they are set opposite in the second column of the Schedule annexed hereto.

(3.) A person suffering from cataract shall not be entitled to compensation under the provisions of the said section on account of that disease for more than six months in all, or for more than four months unless he has undergone an operation for cataract.

Provided that where the judge, committee or arbitrator is satisfied on the advice of the medical referee that an operation could not for medical reasons be performed within four months from the date of the disablement, or that having undergone an operation, the worker is still disabled by the cataract at the expiration of six months from such date, compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct, without prejudice, however, to the right of review conferred by s. 11 of the Act.

Schedule.

Description of Disease or Injury.	Description of Process.
. . . .	. . . .
18. Cataract caused by exposure to rays from molten or red-hot metal.	Any process in the manufacture of iron or steel normally involving exposure to rays from molten or red-hot metal.

E. W. Cave K.C. and *James MacMillan* for the workman.

A. T. James K.C. and *Godfrey Parsons* for the employers.

The arguments sufficiently appear from the judgments.

LORD HANWORTH M.R. [stated the facts as above set out and continued :] The appeal of the workman is based on two grounds : first, that inasmuch as the award gave him a sum during a limited period—namely, ten weeks from October 8, 1928, to December 15, 1928, and no more—it is not right to impose such a limit, because from the replies of the medical referee it is clear that there is partial incapacity certified in that report, and therefore that incapacity did not cease on December 15, 1928, and that if and so far as the Order made by the Secretary of State whereby this form of cataract was made an industrial disease, gave a power to limit the payments to be made and the duration of such payments it was ultra vires; that the Home Secretary had no such power to issue such an Order for the extension of the Schedule; and secondly, that the judge ought, on the report of the medical referee, to have ordered compensation to be paid up to the date when the arbitration was heard, which would be either May 22 or July 17, and that he ought also to have made a declaration of liability.

There is a cross-appeal set down by and on behalf of the employers, and the employers have in their cross-appeal raised a number of points which are directed to the quantum and the duration, and the like, of the payments to be made under the award, but on this cross-appeal Mr. James has pointed out that he does not take these points before this Court, having regard to the terms of the decision in *Davies* v. *Baldwins, Ld.* (1), but he desires to have it made clear that he reserves his right to argue the points contained in the cross-appeal if the case should be taken to the House of Lords. I need not therefore deal with the cross-appeal because it has not been insisted upon, but I also desire to make it quite plain that Mr. James is entitled on behalf of the employers, if the case goes further, to say that he has kept open and has a right to argue these points.

Before turning to what is the substance of the matter, which is the appeal upon the question whether or not the Order under which this form of cataract is introduced into the Act is ultra vires, I will only say a word on the second point—namely, the question as to the quantum and the date at which the payments ought to have been ordered to be made. That point Mr. Cave desires also to keep open, but his serious point which he wishes to present to this Court and to have decided is the question of ultra vires, though should the case go further he has reserved his right by the argument he presented to deal with the second point.

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(1) (1926) 20 B. W. C. C. 116.

Coming now to the main question of ultra vires: Under the Workmen's Compensation Act, 1906, s. 8, provision was made for applying the Act to industrial diseases, and it was provided that where a certifying surgeon, who was defined by the Act, certified that a workman was suffering from a disease mentioned in Sch. III. to the Act and was thereby disabled, that workman should have the right to compensation, treating the disease or suspension from work, as the case might be, as the date of the happening of an accident to him, and that he should thereupon become entitled to the benefits of the Act, subject to modifications. That section is now replaced by s. 43 of the Act of 1925. Turning, then, to the existing section, there is first of all a declaration in the section that the diseases mentioned in Sch. III. to the Act are industrial diseases, and that a certificate that the workman is suffering from those diseases entitles him to receive compensation under the Act. But sub-s. 1 of s. 43 provides that: "He or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications." Then there are inserted in the sub-section a number of so-called modifications. I will refer to cl. (*b*) of that sub-section: "If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease." Then cl. (*d*): "The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable." Under the Act as it stands, the right of the workman to be compensated is a right against the employer in whose employment he is engaged, and that right is given to him as for an injury by accident arising out of and in the course of that employment.

Another of these modifications which is contained in cl. (*e*), introduced by s. 43, is a modification which imposes the liability in respect of the industrial disease on the employer who last employed the workman within the twelve months previous to the date of the disablement or suspension in the employment to the nature of which the disease is due. Thus if a workman is at the time when he obtains the certificate in an employment of one employer which has no relation whatever to the process in which he contracted the disease, the liability is thrown by this modification back on to a different employer from the employer by whom he is then engaged. It is observable, therefore, that under these modifications the terms of the Act itself are changed and altered, and that is described as a modification. By sub-s. 3 of s. 43 power is given to the Secretary of State to "make Orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order." Several Orders have been made during the period since the Act of 1906 with its s. 8 and its sub-section, which is equivalent now to s. 43, sub-s. 3, came into force. Those Orders relating to various diseases and enlarging the ambit of the list of industrial diseases are now consolidated in an Order for the extension of the Schedule, which is intituled Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (S. R. & O., 1929, No. 2). It is dated January 1, 1929. The portion of this Order which applies to this case is para. 3 and item No. 18 of the Schedule. Para. 1 of the Order provides for the inclusion of the items which are catalogued in the Schedule, and it begins: "Subject to the modifications hereinafter specified the provisions of section 43 of the Workmen's Compensation Act, 1925, shall extend and apply to the diseases, injuries, and processes, specified in the first and second columns of the Schedule annexed to this Order." I need not read more. That is the operative part which brings in the diseases named in the Schedule as accidents in respect of which the workman is entitled to be compensated. By para. 3 a person suffering from cataract has certain

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particular provisions made applicable to him. I think para. 3 may be read as if item No. 18 were included in it, and it would then run: "A person suffering from cataract caused by exposure to rays from molten or red-hot metal shall not be entitled to compensation under the provisions of the said section on account of that disease for more than six months in all, or for more than four months unless he has undergone an operation for cataract," and then there follows a proviso.

Mr. Cave takes the point that para. 3 is ultra vires, and says that if under para. 1 the disease of cataract from exposure to rays from molten or red-hot metal is introduced, then when it is introduced a workman is entitled to receive such compensation as he would have received under the Act if he had suffered an accident. To cut that compensation down and to say that it is not to be given for more than four months or six months, as in para. 3, is, so the argument runs, not to make a modification but to put the workman under a disability and to withdraw from him a privilege which has been granted to him by the definite terms of the Workmen's Compensation Act, 1925. In *Davies* v. *Baldwins, Ld.* (1), to which I have already referred, it was held in this Court that the proviso enabled the Court to make an award in favour of the man, even if the operation had taken place outside the time limit of four months or six months which is imposed by the proviso. In other words, that the proviso to para. 3 gives to the judge a general power under which he is able to give compensation beyond the limit of six months, subject to such conditions as he may direct. It is argued that this particular paragraph is ultra vires. I find it, however, difficult to separate that paragraph from the terms under which cataract of this nature is brought within the purview of s. 43 and the workman is given a right to obtain compensation if he suffers from it. It does not appear to me possible to separate and treat as severable the various paragraphs in the Order. Para. 1 was, of course, necessary for the general purpose of showing that the diseases in the Schedule

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were to be included in s. 43; but it is also clear that there may be considerations which ought to modify the bald statement that a particular disease is to be treated as an industrial disease, and para. 3 appears to have that purpose. It all indicates that this form of cataract is not to be treated as introduced into the statute without any limitation at all, but that it is at the time when it is introduced into the statute to carry with it the limitations which are imposed by para. 3.

It is said, however, that so to read para. 3 is to hold that the Secretary of State had a power not merely to modify but radically to alter the rights of the workman. It is, therefore, necessary to consider what is the meaning of the word "modification." Sub-s. 3 of s. 43 contemplates that an extension of the provisions of the section may be made to other diseases, processes and injuries, but with or without "modification." That word, it appears to me, must be used in the same sense in which it is used in sub-s. 1, and in reference to those modifications which are thus named in the clauses (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*). I have already referred to clauses (*b*), (*d*) and (*e*), which modify in vital points the terms of the Act itself. It seems to me, therefore, that giving the same interpretation to the word "modifications" which is referred to in sub-s. 3, the Secretary of State had power to extend the provisions of s. 43 to other processes with not merely what may be called minor modifications or small differences, but on terms which may interfere with the actual rights which are given to the workman in the case of what might be described as accidents arising in the ordinary course of railway working, mining, and such industries. I do not find it possible to accept one portion of the Order and to reject the other, and I think, therefore, that interpreting "modifications" with a wide significance, para. 3 of the Order must be held to be good, even if it cuts down in duration the number of the weekly payments and does not allow them to continue during the full period of incapacity.

For those reasons it appears to me that the Order made by the Secretary of State is valid. More than that, if it is invalid, it must be invalid as a whole, and thus the workman's right to receive any compensation would be cut away. I think that this Court in *Davies* v. *Baldwins, Ld.* (1), acted upon that same interpretation, for the point was argued before us. In that case I expressed the opinion that Mr. Cave had not made any serious inroad upon the validity of the Order. It became unnecessary definitely to decide the point, but incidentally we did send the matter back to be dealt with by an award of the county court judge, and that must have been upon the basis of treating the Order as valid. On the first point, therefore, and on the main point, I think the appeal fails.

With regard to the second point, that the learned judge ought, on the report of the medical referee, to have ordered compensation up to the date of the arbitration and to have made a declaration of liability, I will only say this. That is entirely a subsidiary point, and it has been argued in that sense by Mr. Cave. It is perhaps not quite easy to see why the learned county court judge made use of the exact dates which he did, October 8 to December 15. It might have been possible for him more logically to have given a different period during which compensation was to be paid. These matters, however, are small in the ultimate result, for I think the county court judge was entitled, under the discretion given to him in the proviso to para. 3 of the Order, to give a sum for a further period, and whether he dated that period from a particular date or not, he came to the decision that after ten months of compensation had been paid justice would be done by adding a further ten weekly payments, and those weekly payments he treated as having to be continued from the date when the compensation stopped on October 8 down to December 15. The truth is that such questions are for the discretion of the learned county court judge; he has, within the limitations laid down by the proviso reached a quantum to be paid to the workman, and whether it was decided to be for a period from one date or another makes but little difference, because he was entitled to fix the

(1) 20 B. W. C. C. 116, 125.

sum and the period. He has done that, and he has made an award that the sums payable during those ten weeks should now be paid over to the workman. This, as I say, was not the main point argued.

It appears to me that the learned judge's judgment is not one with which we ought to interfere, even though we cannot quite agree with the dates chosen for the continuance of the period of payment. On these grounds I think the appeal must be dismissed with costs. The cross-appeal will also be dismissed with costs, if there are any.

SLESSER L.J. I agree. In this case Mr. Cave, on behalf of his client, has raised a very important issue—namely, the validity of an Order made by the Secretary of State creating an industrial disease within the meaning of s. 43 of the Workmen's Compensation Act, 1925. The argument and the questions it raises are serious, because although every case which is litigated in the Courts is serious, the result of the decision in this case must necessarily go far beyond the immediate parties to this litigation. Sect. 43 of the Workmen's Compensation Act, 1925, following the Act of 1906, incorporates into the Act certain industrial diseases which notionally it treats as accidents, but from the nature of the case it is necessary that the law relating to accidents and workmen's compensation should be subject to modifications when dealing with industrial diseases. It is stated in s. 43, sub-s. 1, that the disease is to be treated as if it " were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications," and the modifications, in part at any rate, do alter the law as it would have to be applied in the case of an ordinary accident. Thus, with regard to the liability of employers in whose employment the disease is contracted and subsequent employers when disablement arises, and for other purposes, several provisions are contained which are different from those which deal with the liability of an employer under s. 5 of the Act; so that with regard to those diseases which are specifically mentioned in Sch. III. incorporated in the

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Act and not added to by the Order of the Secretary of State, there is no doubt that, so far as the consequences of those diseases and the disablement arising from them are concerned, they have to be treated subject to modifications, which modifications go to the extent of altering some of the statutory provisions of the Act as they apply when you are dealing with an actual and not with a notional accident. By sub-s. 3 of s. 43 power is given to the Secretary of State to make Orders for extending the provisions of the section to other diseases, and when he exercises that power with reference to any diseases those diseases become diseases within s. 43. It is provided in that sub-section that the provisions of s. 43 may be extended to "other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order." I read the word "modifications" in that sub-s. 3 as having a meaning at least as wide as the meaning of the word "modifications" in sub-s. 1 when dealing with those diseases which primarily appear in Sch. III., and therefore, seeing that a modification has been made by s. 43 in the provisions of the Act itself with regard to the diseases which are mentioned in Sch. III., I think similarly it is competent to the Secretary of State in his Order to make modifications with regard to those diseases which he adds to the Schedule which may in the circumstances alter the application to them of some of the provisions of the Act. It may well be that in the case of this particular Order there are in the conditions applying to persons suffering from this form of cataract serious alterations in what otherwise would be the law relating to the right to compensation. I will only refer to one, and that seems to me seriously to alter what otherwise would be the law. It has been decided both in Scotland and in England that there is no power under the Act, apart from some special competent Order, in the judge or arbitrator to make what has been called a prospective award. In *Allan* v. *Thomas Spowart & Co. Ld.* (1) the Sheriff-substitute speculated whether a man would have recovered from the long disuse of his muscles after a certain time, and gave an award to him for compensation to come to an end at a date some months after the hearing. In that case the Lord President said (1): "The Sheriff-substitute has, to a certain extent, pronounced judgment beforehand on a future event. The function of the Sheriff in assessing compensation is to have regard to the man's present state, and he is not entitled to pronounce a judgment beforehand, the validity of which depends on the man's condition at a future date." Again in this country, in *Baker* v. *Jewell* (2), it was held that the learned judge had no power to make an award terminable at a future date, and the decision in *Allan* v. *Thomas Spowart & Co. Ld.* (3) in Scotland was followed. In this present modification by Order (after having limited in the first place the period for which compensation may be paid depending, as was pointed out in *Davies* v. *Baldwins, Ld.* (4), on certain conditions with regard to operations which I need not discuss) the paragraph continues: "Compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct." That would be, were it within the terms of the Act itself, making a prospective award until a future date. That, in fact, is what the learned judge has done in this particular case, by holding that the compensation shall continue for ten weeks from a given date and no longer; but as, in the view which I have formed, there is power in the Secretary of State so to modify the statute that he may alter the actual principles applicable to accidents, that objection does not obtain here. I only add this, that in my opinion from any point of view Mr. Cave, or rather his client, is in this serious difficulty. I find it difficult to think that if this Order be ultra vires so far as this particular form of cataract is concerned it is not ultra vires in whole, and not in part, as Mr. Cave seeks to suggest. So much of the Order as applies to this form of cataract is in part contained in para. 3, containing the conditions limiting the period for the payment of compensation and so on, and doing that to which I have referred, and in part in the Schedule. Indeed, the condition, somewhat illogically, precedes the liability; that is to say, it is first stated for what periods workmen may receive compensation for cataract, and then it is only in the Schedule that the cataract is made specifically an industrial disease. But be that as it may, it is difficult not to read the conditions and the disease as one, and if it be true that the conditions are ultra vires it must follow, in my opinion, that the Order as made by the Secretary of State is bad as a whole. Sect. 43, sub-s. 3, says that the Secretary of State may make Orders. If he may not make them subject to these conditions, it may well have been that he would not have made the Order at all, and it is to do violence to the section to dissect it in that way. Now, if that be right, Mr. Cave, if he had been successful on this point of ultra vires, would have found himself in a difficult position, because if the Order were bad and if I am right in thinking that the whole Order, so far as it affects cataract, was therefore bad, it would follow that the learned county court judge would not have been entitled to have given the ten weeks compensation at all. In my view the result of the success of Mr. Cave's contention would have been that he would have deprived his client of the limited amount of compensation which he has received, because it is not anticipated under s. 43 of the Act itself that cataract caused by exposure to rays from molten or red-hot metal is to be one of the diseases contained in the statute; it is only so by virtue of the Order, and therefore it is not a disease within s. 43 at all. Therefore, it seems to me that to decide that this Order was bad would not have the result of inducing me to allow the appeal. I should arrive at a similar conclusion, that this appeal should be dismissed, even had I thought that the Order was ultra vires; but, having regard to the importance of the issue raised, I think it is right to say that, in my opinion, drastic as are the alterations in the law effected by the Order, nevertheless under the power of modification it is competent for the Secretary of State to make the Order within the ambit of these terms.

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(1) (1906) 8 F. 811.

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(1) (1906) 8 F. 814.

(2) [1910] 2 K. B. 673.

(3) (1906) 8 F. 811.

(4) 20 B. W. C. C. 116.

In my judgment the Order is good, and the rest of the matter being in the discretion of the learned county court judge, I think this appeal should be dismissed.

ROMER L.J. I agree. By s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, it is in effect provided that where a workman employed in a certain process is found to be suffering from a disease contracted by being so employed he is to be entitled to compensation under the Act as if the disease were a personal injury by accident arising out of and in the course of the employment. The particular diseases and processes are referred to in Sch. III. to the Act. Then by sub-s. 3 of s. 43 it is provided as follows: "The Secretary of State may make Orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such modifications as may be contained in the Order." In pursuance of that power the Secretary of State did on January 1, 1929, make a consolidating Order taking the place of earlier Orders more or less to the same effect. By that Order he provided by para. 1 that "subject to the modifications hereinafter specified the provisions of s. 43 of the Workmen's Compensation Act, 1925, shall extend and apply to the diseases, injuries and processes specified in the first and second columns of the Schedule annexed to this Order." There is included amongst the diseases referred to in that Schedule: "Cataract caused by exposure to rays from molten or red-hot metal." By para. 3 of that Order it is provided that a person suffering from chronic cataract shall not be entitled to compensation under the provisions of the Order, except for a certain period. Then there are provisions enabling that period to be extended in certain circumstances.

It is said that this Order is ultra vires the Secretary of State so far as it sought to impose this limitation which is contained in para. 3. In point of fact, that very point was raised before this Court in *Davies* v. *Baldwins, Ld.* (1), but the Court did not express any final opinion upon the matter,

(1) 20 B. W. C. C. 116, 125.

although the present Master of the Rolls, I think, expressed his own view upon the matter in no uncertain terms. The other members of the Court did not express any view one way or the other, but inasmuch as the matter in debate there was referred back to the county court judge to take action upon this paragraph of the Order, I think one may assume that the other members of the Court were of the same opinion as the Master of the Rolls. However that may be, I agree that it is still open to Mr. Cave to argue the point upon this appeal.

The decision of the point depends on the construction which is to be put upon sub-s. 3 of s. 43. It is quite clear, it appears to me, that the Secretary of State when making an Order extending the provisions of s. 43 to other diseases and other processes must be entitled to make modifications of the provisions of the Act of 1925 relating to compensation, because one of the provisions, and the most important provision, of s. 43 is that the workmen who are to come within its operation are to be entitled to compensation under the Act of 1925. It seems to me that the Secretary of State plainly had power when bringing further processes and further diseases within the purview of s. 43 of the Act to say that the provisions of the 1925 Act relating to compensation are only to apply to these particular workmen with modifications. He could, I think, have said in the Order that the provisions so-and-so in the Act of 1925 shall not apply to workmen who are employed in this particular process, or who are suffering from that particular disease. If he could impose such a modification as that, he could also a fortiori say that a certain provision which gives compensation to a workman indefinitely or for a certain period shall only apply and entitle the workman to compensation for a less period. But then it was said by Mr. Cave: "Oh, but there is no power in the Secretary of State to make such a modification of the provisions of s. 43 by his Order as would deprive the workman of any of the compensation to which he would have been entitled under the Act of 1925 had he been a person who came within the purview of that Act." It appears to me that the Legislature has given an answer to that contention, because in point of fact s. 43, sub-s. 1, of the Act of 1925 does not extend all the provisions of the Act of 1925 to persons who are suffering from the diseases mentioned in Sch. III., but only those provisions subject to what the Act calls modifications, and when I turn to one of the modifications I find that modification (*b*) is of this nature: that in certain circumstances the workman is to be deprived of all compensation under the Act; that is to say, a workman who is brought within the purview of the general provisions of the Act of 1925 is, by virtue of s. 43, sub-s. 1 (*b*), to be deprived of all compensation. That of itself is, I think, sufficient to show that Mr. Cave's argument cannot prevail. The phrase "subject to modification" in sub-s. 3 of s. 43 cannot be qualified in the way in which he asks us to qualify it. In my opinion the Order is intra vires. If we had come to the conclusion that it was ultra vires, the result might, I think, have been that persons suffering from cataract would be entirely excluded from the benefit of the provisions of s. 43. If the Secretary of State by para. 1 of the Order had ordered that persons who suffered from cataract should be entitled under the provisions of s. 43, and by a later paragraph of the Order had imposed certain conditions, I think it would have been open to argument that he had by para. 1 intimated an opinion that in any event a workman suffering from that disease should be entitled to the benefits of s. 43, and to have been possible to treat the subsequent modifications imposed by the Order as being severable; but, as I pointed out just now in reading the Order the Secretary of State has in terms only applied the provision of s. 43 to those persons subject to the modifications contained in the Order. That being so, we have no sure ground for thinking that but for these modifications the Secretary of State would have ever desired that the provisions of s. 43 should extend to persons suffering from cataract.

On the other point which has been raised on the workman's appeal I do not desire to add anything to what has been said by the Master of the Rolls.

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LORD HANWORTH M.R. The workman's appeal will be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *A. Russell Jones.*

Solicitors for respondents: *Gibbs, White & King, for Moxon & Petty, Newport, Mon.*

W. I. C.

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March 5, 18.

ABBEY *v.* BARNSTYN.

Landlord and Tenant—Decontrol—Dwelling-house—Agreement for Tenancy—"Tenant"—Executrix of contractual Tenant—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 2.

The Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 2, provides: "Where . . . . the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the twenty-fourth day of June, nineteen hundred and twenty-six, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . . ":—

Held, that sub-section applied where such a lease was granted to a contractual tenant. There was no reason for giving "the tenant" in the sub-section the limited meaning of statutory tenant.

Dictum of Scrutton L.J. in *Bartram* v. *Brown* [1929] 1 K. B. 103, 132 discussed and explained.

By an agreement for a lease dated January 31, 1919, the shop and premises, No. 9 Cranbourne Street, Brighton, were let to W. for a term of two years from March 25, 1919, at a rent of 45*l.* per annum, the tenancy to continue thereafter, but to be terminable by six months' notice in writing. On September 16, 1921, the landlord gave W. six months' notice to determine the tenancy, which expired on March 25, 1922 but W. continued to occupy the premises at a rent of 54*l.* per annum after the notice expired. On May 7, 1926, W. died, having by his will appointed his wife his sole executrix and universal legatee. Mrs. W. did not go into physical possession of the premises before May 26, 1926, when she entered into an agreement to take the premises on a three years' tenancy at the same rent. On July 26, 1926, she assigned the benefit of the agreement to the defendant. On December 5, 1927, the plaintiffs acquired the freehold of the premises, and on January 5, 1928, gave notice to the defendant terminating the tenancy at the expiration of the term. The defendant, however, claimed to hold over under the Rent and Mortgage Interest Restriction Acts, 1920 and 1923, and the plaintiffs brought these proceedings for possession, claiming that although the premises had been a dwelling-house within the Acts they had been decontrolled as a result of the agreement of May 26, 1926.

On appeal from an order made by the county court judge for possession :—

Held (affirming the order of the county court judge), (1.) that there was evidence before the county court judge to support his finding that W. became a contractual tenant at the increased rent after the termination of the tenancy agreement of January 31, 1919.

(2.) that Mrs. W. was consequently a contractual tenant at the date of the agreement of May 26, 1926.

(3.) that the agreement of May 26, 1926, therefore operated to decontrol the premises.

APPEAL from Brighton County Court.

By an agreement dated January 31, 1919, one Garrett agreed to let the shop and premises, 9 Cranbourne Street, Brighton, to Alexander Watson for a term of two years commencing on March 25, 1919, and thereafter until six months' notice was given at the rent of 45*l.* per annum. On September 16, 1921, the landlord gave the tenant six months' notice to quit, which expired on March 25, 1922, but the tenant remained in possession, paying an increased rent of 54*l.* per annum. On May 7, 1926, Alexander Watson died having by his will appointed his wife Jane Rebecca Watson his sole executrix and universal legatee. She never went into physical possession of the property or assented in writing to the premises vesting in herself; but on May 17, 1926, she wrote to Mr. Stephen Botting, the landlord's agent: "Re No. 9 Cranbourne Street, Brighton. On your granting me a three years' agreement from the 24th June next, I am willing to surrender my interest in the agreement now running and dated the 31st January, 1919, and made between William Garrett and Alexander Watson (now deceased). The new agreement to be at the same rent as now, namely, 54*l.* per annum and taxes, and on the same conditions as in the existing agreement." As a result an agreement was entered into dated May 26, 1926, by which Garrett agreed to let the premises to Mrs. Watson for the term of three years from June 24, 1926, at a yearly rent of 54*l.*, and if not then determined by a previous six months' notice the tenancy was to continue as a yearly tenancy.

The residential portion of the premises had been from time to time sub-let by Alexander Watson to successive sub-tenants. The last of them vacated the premises a day or two before May 26, 1926. Alexander Watson's will was proved on June 3, 1926, and on July 26, 1926, Mrs. Watson assigned her interest under the new agreement to the defendant. On December 5, 1927, the plaintiffs purchased the freehold of the premises from Garrett, and on January 5, 1928, they served on the defendant a notice to quit on June 24, 1929.

The defendant however claimed to hold over under the Rent Restriction Acts, the premises being admittedly a dwelling-house subject to the provisions of those Acts unless they had been decontrolled. The plaintiffs brought proceedings in the county court for possession, contending that the premises had been decontrolled as a result of the agreement of May 26, 1926, but the defendant denied this on the ground that Mrs. Watson was not immediately before the date of that agreement "the tenant" within s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923.

The county court judge held that Alexander Watson remained in possession after March 25, 1922, as the contractual tenant on a new tenancy at an increased rent and was at his death a contractual tenant of the premises, so that the tenancy passed under his will to Mrs. Watson. Mrs. Watson was therefore "the tenant" within s. 2, sub-s. 2, of the Act of 1923 when the new tenancy agreement of May 26, 1926, was entered into, so that the premises thereupon became decontrolled, and he made an order for possession.

The defendant appealed.

The effect of the evidence so far as material is stated in the judgments.

Croom-Johnson K.C. and *T. J. Sophian* for the appellant. The county court judge has found that after the expiry of the notice to quit on March 25, 1922, Watson continued to be a contractual tenant at the increased rent of 54*l.* per annum. There is no evidence to justify such a finding. The true view of the facts is that Watson held over as a statutory tenant under the Rent Restriction Acts at the increased rent, which was made up of the original rent of 45*l.* and the permitted increase of 9*l.* under the Acts. When a tenant remains in possession after notice to quit, no new notice to quit is required before the rent is raised to the permitted extent: *Shuter* v. *Hersh.* (1) If so, the appellant is entitled to succeed, because a statutory tenancy cannot be transmitted by will and does not vest on the tenant's death in his personal representatives: *John Lovibond & Sons, Ld.* v. *Vincent.* (2) Consequently Mrs. Watson was never on this view "the tenant" within s. 2, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1923, and the tenancy agreement of May 26, 1926, not having been entered into with "the tenant," the premises were not decontrolled.

If, however, Watson was a contractual tenant at his death, the tenancy vested in Mrs. Watson as his executrix. This was not enough, however, to make her "the tenant." As long as she held simply as executrix and did not enter into possession, she was not personally liable to be sued for rent or for breach of covenant and was not therefore the tenant: *Nation* v. *Tozer* (3); *Wollaston* v. *Hakewill* (4); *Stratford-upon-Avon Corporation* v. *Parker* (5); *Rendall* v. *Andreae.* (6)

[ROMER L.J. When a tenant for a term of years dies, surely the term vests in the executor who qua executor becomes the tenant.]

A tenant is only liable for rent because he holds the property, and an executor who has not gone into possession does not do so.

[GREER L.J. Rent must be chargeable against the executor to the extent of his testator's assets in his hands.]

That may be so, but it does not make him the tenant, though if he once pays rent he becomes a tenant by estoppel. It would have been different if Mrs. Watson had assented to the property vesting in herself beneficially, but in 1926 an assent in writing had become necessary and none had been given up to the date of the new agreement. Further, though the residential part of the premises had been sublet, it was given up by the sub-tenants some days before May 26, 1926. Therefore at this critical date Mrs. Watson was neither in physical possession nor in receipt of rents. It follows that on this view also the new agreement was not entered into with "the tenant" and there was therefore no decontrol.

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(1) [1922] 1 K. B. 438.
(2) [1929] 1 K. B. 687.
(3) (1834) 1 C. M. & R. 172.
(4) (1841) 3 Man. & G. 297.
(5) [1914] 2 K. B. 562, 567.
(6) (1892) 61 L. J. (Q. B.) 630.

Lastly, even if Mrs. Watson was a tenant of the premises at the critical date under the contractual tenancy, that is not enough to satisfy s. 2, sub-s. 2, of the Act of 1923. Under that sub-section "the tenant" means the statutory tenant and does not refer to a contractual tenant: see *Bartram* v. *Brown* (1) where, Scrutton L.J. said: "I think the object of the sub-section was to allow the change from a tenant under the Acts to a tenant under contract. . . . ." By tenant under the Acts he cannot only have meant what it has become the practice to call a statutory tenant: see also *Kingsley* v. *Adler*. (2) This construction of s. 2, sub-s. 2, is not unduly strained. Thus in s. 5, sub-s. 1, "the tenant" can only mean the statutory tenant. On this ground also, therefore, there has been no decontrol and the appellant is entitled to succeed.

Conway K.C. and *Eric Neve* for the respondents. The burden of proving that the premises are still within the Rent Restriction Acts is on the appellant, and for this purpose he must show not only that the premises were originally premises to which the Acts applied (as is admitted) but also that they have not been decontrolled under s. 2 of the Act of 1923. That being so it is not for him to complain of the inadequacy of the evidence. The defendant is in the position of not having discharged the onus of proof. But even if this contention as to the onus of proof is wrong, it is submitted that there is evidence enabling the Court to hold that Mrs. Watson was "the tenant" at the time of the agreement of May 26, 1926. There is evidence on which the county

(1) [1929] 1 K. B. 103, 132.

(2) [1929] 1 K. B. 525.

court judge could hold that Alexander Watson was the contractual tenant at the time of his death and that Mrs. Watson was in under this contractual tenancy at the date of the new tenancy agreement. The machinery of the Act required that notice should be given before the rent of a statutory tenant was increased. No such notice was proved. But even if Mr. Watson had been a statutory tenant, there was evidence that rent was afterwards paid by or on behalf of Mrs. Watson, and this would be enough to make her a contractual tenant. The view that she was a contractual tenant is supported by her letter of May 17, 1926, in which she offered to surrender her existing tenancy on the new agreement being entered into. The county court judge has however found that Watson was a contractual tenant, and that finding ought not to be disturbed. If so, Mrs. Watson was clearly "the tenant" when the new agreement was signed. Rent was paid on June 30 following, covering the period between May 7 and May 26, and that is in itself sufficient to show that she was a contractual tenant.

Further, there is no reason for limiting the meaning of "tenant" in s. 2, sub-s. 2, to a "statutory tenant." The expression is one which never occurs in the Acts except in a marginal note to s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is contended that "the tenant" in s. 2, sub-s. 2, includes both contractual and statutory tenants. This view receives support from the construction put on the proviso to sub-s. 2 in *Roe* v. *Russell*. (1) *Bartram* v. *Brown* (2) throws no light on this question.

Croom-Johnson K.C. in reply. When once it had been established that the premises in question came within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the onus shifted and it was for the respondents to prove decontrol: compare s. 12, sub-s. 6, of the Act of 1920 and *Platman* v. *Frohman*. (3) It is not the practice to call upon a party to prove a negative. Further, it is the duty of

(1) [1928] 2 K. B. 117.

(2) [1929] 1 K. B. 103, 132.

(3) [1929] 1 K. B. 376, 379.

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the Court in every case to ascertain whether the Rent Restriction Acts apply: *Salter* v. *Lask*. (1)

Cur. adv. vult.

March 18. GREER L.J. The judge of the Brighton County Court gave judgment for the plaintiffs, the landlords of No. 9 Cranbourne Street, Brighton, granting them an order for possession. The defendant appeals from that judgment. The question involved in the appeal is whether the dwelling-house in question, which at one time was a house to which the Rent Restriction Acts applied, had been decontrolled by an agreement of tenancy dated May 26, 1926, entered into between the plaintiffs' predecessor in title and the defendant's predecessor in title, a Mrs. Watson. The broad facts of the case are as follows. On January 31, 1919, the plaintiffs' predecessor in title granted to a Mr. Watson a two years' lease of the premises commencing on March 25, 1919, and thereafter until six months' notice was given. On September 16, 1921, the landlord gave the tenant six months' notice to quit, which expired on March 25, 1922. The tenant did not give up possession. Whether he took a new tenancy by agreement at the rent of 54*l.*, or whether he merely remained in possession as a statutory tenant under the Rent Restriction Acts, was one of the principal points is dispute in the action. He died on May 7, 1926, leaving a will under which his widow was executrix and sole legatee. On May 17, 1926, Mrs. Watson wrote to the landlord's agent the letter of that date, which reads as follows: "Re 9, Cranbourne Street, Brighton. On your granting me a three years' agreement from the 24th June next I am willing to surrender my interest in the agreement now running and dated the 31st January, 1919, and made between William Garrett and Alexander Watson (now deceased). The new agreement to be at the same rent as now, namely, 54*l.* per annum and taxes, and on the same conditions as in the existing agreement." Thereafter the landlord granted to

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(1) [1924] 1 K. B. 754.

Mrs. Watson a three years' lease commencing on June 24, 1926, which on July 26, 1926, Mrs. Watson assigned to the defendant. The lease having expired the plaintiffs as successors in title to Mrs. Watson's landlord brought this action for possession.

The 54*l*. consisted of 45*l*., the original rent, plus the permitted increases. It was contended for the appellant: (1.) that the onus was on the plaintiffs to prove that the dwelling-house which had attained the status of a rent restriction house had ceased to have that status, and that if the evidence left decontrol in doubt the defendant was entitled to succeed; (2.) that the only reasonable inference from the evidence was that there was no new agreement of tenancy between Watson and his landlord, but that he remained in possession as a statutory tenant; (3.) that even if he was a contractual tenant, to whose rights his executrix succeeded, she could not be deemed "the tenant" within the meaning of s. 2, sub-s. 2, of the Rent Restriction Act of 1923.

I am inclined to think that the appellant's first contention is right. Once the legal status of any person or thing is established it seems to me right to say that any one relying on its determination must prove it. It will be seen, however, that it is unnecessary to finally determine this point. As will appear later I have come to the conclusion that there was evidence on which the judge was entitled to come to the conclusion that Watson at the end of his lease became a tenant from year to year.

Before directing my attention expressly to the second and third contentions of the appellant I think it will be useful to make some general observations about the character and history of the legislation relating to rent restriction. When the war had continued for more than a year, the need for legislation to restrain the landlords of small houses from raising rents and from evicting their tenants in order to let their houses at increased rents became apparent. A considerable proportion of the younger citizens of this country were being drafted into the Army, the building of new houses had almost ceased, and if landlords had been allowed freedom to raise rents or to evict tenants, this might have been a national calamity. Accordingly the Act of 1915 was passed as a temporary measure to deal with the emergency solely due to the war, for which neither the landlords nor the tenants were responsible. It was provided that the Act should continue in force during the continuance of the war and for six months thereafter. The standard rent beyond which, with certain exceptions, the rent could not be increased, and on payment of which the tenant was entitled to remain in possession after the determination of his contractual tenancy, was fixed—stating the matter broadly—at the pre-war rent. The Act only applied to dwelling-houses in London where the rent did not exceed 35*l*., in Scotland 30*l*., and elsewhere 25*l*. This statute involved a certain amount of injustice to landlords which operated more and more harshly as time went on. They were able to receive the same amount of rent, measured in money, as they had received before the war, but the money so received became of less and less value to them as time went on, owing to the decreasing value of money measured by its purchasing power. But it was thought better to put the burden on the broader back of the landlord rather than leave it where it would otherwise be, on the back of the poorer tenant. Where the landlord incurred expenditure on the improvement or structural alteration of a dwelling-house to which the Act applied he was to be entitled to increase the rent by 6 per cent. An increase was also permitted where the landlord paid the rates, when the rates were increased. There were certain provisions requiring notices by the landlord to be served before the increases could be due and recoverable. From time to time houses of a higher rental were brought within the Act, and the extent to which the landlords were permitted to increase the rents was enlarged. The general character of the legislation, however, remained unchanged. It restricted the right of the landlord to recover any rent beyond the standard rent plus the permitted increases, and it prohibited the Courts from making orders for possession so long as the tenant continued to pay the statutory rent.

The restraint on increase of rent applied to tenancies which were true contractual tenancies as well as to the rent payable by a tenant whose term had come to an end. Before the permitted increases could be recovered, contractual tenancies had to be determined and certain statutory notices had in any event to be given. But none of the Acts contain any provision expressly restraining the creation of a new relationship of landlord and tenant by an express agreement letting the dwelling-house at a rent which was not in excess of the standard rent plus the permitted increases. It seems to me this could be done without giving any of the prescribed notices.

A defendant to an action for possession might be in one of three positions: (1.) that of a contractual tenant whose term had not expired; (2.) that of a person who had been a contractual tenant, whose tenancy had been determined but who was entitled to remain in possession because no Court could make any order for his ejectment; and (3.) that of a mere trespasser. Strictly speaking the relationship of landlord and tenant only existed between the landlord and tenant where the occupier was in class 1, but in course of time a practice grew up of speaking of statutory tenants. It is not quite clear whether the distinction between class 1 and class 2 was always kept in view. But the term "statutory tenant" was in the main used to describe a person enjoying the rights of an occupier in class 2. Certain modifications of the first statute were made by the Courts Emergency Powers Act of 1917, and the Increase of Rent Amendment Act, 1918. The Act of 1919 prolonged the duration of the principal Act, and brought dwelling-houses at higher rents within its provisions, and contained some minor amendments. Neither of these statutes affect the questions we have to determine in this appeal. The Act of 1920 consolidated and amended the earlier Acts and made certain amendments which are not material. It is with this Act and the Act of 1923, which provides that in certain cases the Act shall no longer apply to certain houses, that we are concerned in this appeal. In the margin to s. 15 of the Consolidating Act of 1920 the words "statutory tenancy" appear as applying to the relationship between the ex-landlord and the ex-tenant, where the latter is protected from ejectment. The section itself does not use the term. It provides that so long as the tenant retaining possession by virtue of the provisions of that Act retains possession he must observe and shall be entitled to the benefit of all the terms and conditions of the original tenancy. The term "statutory tenant" has been frequently criticized, but it does not seem to me to be inapt to describe the occupier, who by statute is entitled to remain in occupation after his contractual tenancy has been determined, but must remain in occupation subject to the obligations and benefits of the original contract of tenancy. The use of the word "tenant" for such an occupier does however create some difficulty when we have to interpret the word "tenant" when used in other parts of the Act, and in the decontrolling section of the Act of 1923.

Sect. 1 of the Act of 1920 clearly refers not merely to the statutory tenant, but also to the tenant in the proper sense of the word—the occupier holding under an agreement of tenancy. Sect. 3 deals with permitted increases, and sub-s. 2 clearly includes in the words "the tenant" a tenant holding under a tenancy agreement. A notice to quit must be given to such a tenant before the increases can be put into operation in the case of a contractual tenancy that has not been determined: see *Hill* v. *Hasler*. (1) The rent can therefore not be increased until after the determination of the existing contractual tenancy, and s. 3, sub-s. 2, requires in addition the notice there provided for. If these notices are given the increased rent may be lawfully demanded from the statutory tenant.

It has been decided that on the death of a statutory tenant the executor does not succeed to the rights of a statutory tenant. These are personal to him: *John Lovibond & Sons, Ld.* v. *Vincent*. (2) Therefore if Mr. Watson was a statutory tenant when he died, there was no one who could claim as

(1) [1921] 3 K. B. 643. (2) [1929] 1 K. B. 687.

his successor the rights of a statutory tenant. The Rent Restriction Acts which operate in rem would still apply to the dwelling-house unless it became decontrolled under s. 2 of the Act of 1923. This could only be brought about by the landlord going into physical possession under s. 2, sub-s. 1. This did not happen. It was necessary therefore for the county court judge to determine whether Mr. Watson was merely a statutory tenant or, on the other hand, a contractual tenant. The evidence as to what happened on March 25, 1922, when Watson's original tenancy came to an end by effluxion of time appears in the judge's note. But he heard the witnesses and was in a better position than we are to interpret the oral evidence. His note may not be a very full one. The evidence of the landlords' agent as noted by the judge is as follows: "Know that Watson was given notice to quit. Had a communication with Mrs. Watson. His agreement ran on to March 25, 1922, when we put up the rent to 54*l.* as Watson was a statutory tenant. Originally rent was 45*l.* a year. I say he was a statutory tenant because the rent brought the house within the Rent Acts. Watson continued and paid rent regularly. Watson died May 7, 1926. Produce letter May 17, 1926." I think on this evidence the judge was entitled to find that there was no notice as required by the Act preliminary to an increase, but that what happened was that a new contractual tenancy from year to year was created by payment and receipt of the first quarter's rent at the rate of 54*l.*, the amount of the old rent plus the permitted increases, and that Watson thereafter became a contractual tenant from year to year at a rent of 54*l.* It is true that the witness speaking of the position of Watson is recorded in the note as saying that Watson's rent was put up to 54*l.* as Watson was a statutory tenant. This may merely have meant that the rent was put up to 54*l.* as that was the limit to which it could be raised, the dwelling-house being one to which the Rent Restriction Acts applied. The witness went on to say: "I say he was a statutory tenant because the rent brought the house within the Rent Acts." He does not say "because he held over after

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the determination of his tenancy and the due notices having been given he became a statutory tenant at the increased rent." The learned judge was also entitled to draw inferences from Mrs. Watson's letter of May 17, 1926, and the way in which it was dealt with by the landlords' agent. He could treat the landlords' agent as admitting that Mrs. Watson's statement that she had an interest in a running agreement of tenancy was correct and that she was therefore a contractual tenant. I think there was evidence that Watson was at his death a contractual tenant and that his tenancy passed to his executrix on proof of his will. It is unnecessary to decide whether in the absence of the statutory notice the additional 9*l*. could or could not be recovered by the landlord.

What then is the position when the tenancy has come to an end and the notice required by s. 3, sub-s. 2, has not been given, and a new agreement of tenancy is made for a total rent in amount equal to the standard rent plus the permitted increase? Is such an agreement altogether invalid, so that the tenant becomes a statutory tenant under the Act, or does he become again a contractual tenant at the increased rent? As I have already said I can find nothing in the Act which prevents the landlord and tenant creating a new contractual tenancy at a rent no greater than the aggregate of the standard rent and the permitted increases. If this be right, the tenant is then a true tenant with an agreement of tenancy which may be assigned and which will pass to an executor as part of a deceased tenant's estate. Whether such a new tenancy has been created by agreement is a question of fact in every case. In the present case I think there was evidence on which the judge was entitled to find, as he did, that a new contractual tenancy had been created, and that therefore the executor succeeded as assignee in law to the rights of a tenant, and subject to the liabilities of a tenant to the extent of assets in her hands until she did something which amounted to taking over a liability beyond the assets. She did not obtain the new lease as a stranger, but as a tenant whose term was still running. It does not seem to me to matter that she had not taken physical possession.

She was tenant as executrix, though only liable for the rent to the extent of assets. I think the appellant's contention that she was not a contractual tenant fails.

The other point argued was that sub-s. 2 of s. 2 of the decontrolling statute of 1923 only applies where the lease is granted to a statutory tenant and does not apply where a lease is granted to an existing contractual tenant. I think this fails also. The words of the section are these: "Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the twenty-fourth day of June, nineteen hundred and twenty-six"—that has been amended by the Rent and Mortgage Restrictions Act, 1925, in this form for "after the 24th June, 1926" read "not earlier than one year after the date fixed at the time at which the lease is granted for the expiration of the principal Act"—"being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house, and nothing in the principal Act shall be taken as preventing or invalidating the payment of any agreed sum as part of the consideration for such lease or agreement." As I have already pointed out, the principal Act applies to contractual tenancies as well as to statutory tenancies. The Act of 1923 falls to be construed as one with the principal Act. I see no reason for construing the words "the tenant" in s. 2, sub-s. 2, as meaning only the statutory tenant. The term "the sitting tenant" has indeed been used as a convenient expression (see *Lloyd* v. *Cook* (1) and other cases), but the use of this phrase was not intended to confine the meaning of the words "the tenant" to the tenant actually sitting in or in physical possession of the house. I think it means the actual tenant who is either in possession or entitled to be in possession. The tenant referred to may be either the contractual tenant, or the statutory tenant.

(1) [1929] 1 K. B. 103.

I therefore conclude that the appeal fails, as the appellant has failed to establish that the learned county court judge made any mistake in law. The appeal will be dismissed with costs.

ROMER L.J. The first question to be decided upon this appeal is whether there was any evidence before the learned county court judge upon which he was entitled to base his finding that after March 25, 1922, Alexander Watson remained in possession of the premises as the contractual tenant of William Garrett and not merely as a statutory tenant. Upon this question I have felt, and still feel, considerable doubt; but upon the whole I have come to the conclusion that there was some evidence upon which he was entitled to find that an agreement was come to between Garrett and Watson for a new contractual tenancy after the expiration of the January 31, 1919, agreement. If there was no such agreement then William Watson was at the time of his death a statutory tenant and no interest in the premises passed on his death to Mrs. Watson either as his executrix or otherwise. The letter of May 17, 1926, addressed to Botting however refers to her having an interest in the agreement now running and, for all that appears to the contrary, the negotiations between her and Botting that ended in the new agreement of May 26, 1926, proceeded upon this footing. It is true that she refers to it as having been dated January 31, 1919, but the learned judge said: "This is no doubt an error." It is impossible to suppose that he would have said this unless something transpired in the course of the evidence to warrant it. The letter was therefore some indication of a new agreement having been entered into. The learned judge also based his conclusion upon a finding that rent had been paid and accepted up to June 24, 1926. If his note represents all that was said upon this subject there was no evidence properly so called to support this finding. For all that Botting said was that "Rent must have been paid by Mrs. Watson for the quarter ending June 24, 1926," and she herself said that she could not remember who paid the rent due June 24, 1926, and later said that she paid her husband's current debts but could not remember if she paid that rent. It will be observed, however, that all these statements are capable of being regarded as being addressed not so much to the question of whether the rent was ever paid in fact, but of whether it was Mrs. Watson who paid it. I think that this must have been the sense in which the statements were regarded by the learned judge, and that he must have treated the payment of the rent by somebody as being a fact not in dispute. If the rent was in fact paid, he was, I think, justified in drawing the inference that it was paid by or on behalf of Mrs. Watson. In these circumstances I am not prepared to hold that there was no evidence before the learned judge upon which he could find that an agreement for a new tenancy had been come to between Garrett and Alexander Watson.

The next question is whether the agreement of May 26, 1926, was one entered into by the landlord of the premises with the tenant within the meaning of s. 2, sub-s. 2, of the Rent Restriction Act, 1923. That Mrs. Watson was the tenant of the premises in the ordinary acceptation of the term does not in my judgment permit of a doubt having regard to the findings of fact in the county court. At the death of Alexander Watson his new contractual tenancy found to have been created in March, 1922, was treated by the learned judge as being undetermined. He was entitled, I think, so to treat it, having regard to the letter of May 17, 1926. The unexpired portion of that tenancy accordingly vested in Mrs. Watson as the executrix of her husband. As such executrix she was, therefore, the tenant of the premises, and the fact that she would not before entry become liable for the rent in her personal capacity is immaterial. But was she "the tenant" within the meaning of the sub-section? Seeing that they occur in a Rent Restriction Act, it might safely be guessed, without even looking at the sub-section, that the words "the tenant" do not mean "the tenant" and nothing more. When the sub-section is looked at, the guess will appear to be well founded. The words obviously must include what is called the statutory tenant who is not a tenant at all. It is also obvious that even the word "landlord" in the section may have been used as including some one who is not a landlord at all, a question that has given rise to much difference of judicial opinion and that has only recently been settled by the Court of Appeal. Encouraged by these evidences of loose phraseology employed in the section, the appellant strenuously contended before us that the words "the tenant" not only included some one who was not the tenant at all, but excluded everybody who was. This is not by any means an a priori impossibility, but I fail to see any reason for construing the words in this way. If the Legislature thought it right, as admittedly it did, that a lease of a certain character to the statutory tenant should operate to decontrol a dwelling-house affected by the Rent Restriction Acts, I cannot conceive why it should not have intended a similar lease to the contractual tenant to have the same effect. It was however contended that Scrutton L.J. in the course of his judgment in what are sometimes called "The Five Cases" (1) had expressed the opinion that "the tenant" in the sub-section meant the statutory tenant and no one else. In my opinion he did nothing of the kind. One of those cases was *Bartram* v. *Brown.* (1) In that case it had been contended that a lease granted to a person who was neither the statutory nor the contractual tenant had the effect of decontrolling the premises under the sub-section; in other words, that "the tenant" meant "any person or persons whatsoever." The Court of Appeal did not, of course, accede to this contention, though it is a striking illustration of the distrust engendered in the minds of the legal profession by the phraseology employed in the Acts that the point should have been argued at all. In giving judgment on the point, however, Scrutton L.J. said this (2): "I think the object of the sub-section was to allow the change from a tenant under the Acts to a tenant under contract," and it was suggested to us that by the expression "tenant under the Acts" the Lord Justice meant a statutory tenant. I doubt

(1) [1929] 1 K. B. 103.

(2) [1929] 1 K. B. 132.

even this. But I feel certain that he in no way meant to exclude an existing contractual tenant, or to intimate that a new lease to such a tenant would not effect a decontrol. This seems to be made clear from what he said a few lines later (1): "The whole aim of s. 2 in my opinion was to accelerate decontrol, if vested interests were extinguished or provided for."

The learned county court judge held that Mrs. Watson, the executrix, was "the tenant" within the meaning of sub-s. 2, and in my opinion he was right.

The appeal fails and must be dismissed with costs.

Solicitors: *Gordon Gardiner, Carpenter & Co., for F. H. Carpenter, Brighton; Nye, Moreton & Clowes, for J. K. Nye & Donne, Brighton.*

H. C. G.

STURLEY AND OTHERS v. POWELL.

1930
Feb. 6.

Shipping—Fisherman—Remuneration—Share of Proceeds of Catch—Additional Payment by Owner—Wage or Loan—Action for Recovery—Jurisdiction of Court—Dispute—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 387.

The plaintiffs, who were the owners of a steam fishing boat, brought an action in the county court against the defendant, who was a member of the crew of the boat, claiming a sum as money lent by them to the defendant. The defendant alleged in defence that the sum claimed had been paid to him as wages; and, further, that the county court had no jurisdiction, the question between the parties being a dispute concerning wages within s. 387 of the Merchant Shipping Act, 1894, which could only be dealt with by a superintendent thereunder. At the trial it was found as a fact that the sum claimed had been lent to the defendant, and that there was no real dispute concerning wages:—

Held, that the county court had jurisdiction to entertain the action notwithstanding the section, inasmuch as that court had all along had jurisdiction to entertain an action for money lent and the section did not either expressly or by implication exclude that jurisdiction; and, further, that the jurisdiction of the superintendent under the section did not arise until a party to the dispute called upon him to decide it, and here no party had called upon him to do so.

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(1) [1929] 1 K. B. 133.

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STURLEY v. POWELL.

APPEAL from Pembrokeshire County Court sitting at Haverfordwest.

The plaintiffs, Sturley and others, were the owners of the steam fishing boat *Fleck* of about 40 tons net, which was a drifter in construction but a "liner" according to its method of fishing by line. The plaintiffs entrusted the management of the vessel to their agents, Messrs. J. Hellings & Sons, of Milford Haven. The defendant, Thomas Powell, was a member of the crew and chief engineer of the vessel from May, 1924, to November, 1927.

The half-yearly running agreements or logs of the vessel, which were signed by the skipper and each member of the crew, provided (inter alia) that the net profits arising from sale of the fish caught on each voyage, after deducting all usual expenses, should be divided into 12½ shares, of which 5 should be for the owners and 7½ for the crew, and that these last mentioned shares should be divided amongst the crew in certain proportions, the defendant's share of the whole being 1⅛. The running agreements were made upon a common printed form with additions in writing, and those of them which covered the defendant's period of service differed from each other in certain details in regard to accounts and other matters, though not in regard to the basis of remuneration above mentioned. The voyages occasionally resulted in a loss, or in a very small profit, and in these cases the owners paid to each member of the crew a sum which along with his share of the profits of the catch, if any, gave him at least 3*l*. a voyage.

In February, 1929, the plaintiffs brought this action against the defendant in the county court alleging that the defendant was employed by them upon the terms of receiving by way of remuneration a share of the net proceeds of the catches of fish, and that during his period of employment he had from time to time drawn certain sums from the plaintiffs through their agents on account of his share of these proceeds, which sums on a settlement of accounts between the parties exceeded by 106*l*. 10*s*. 4*d*. the amount to which the defendant was entitled in respect of that share, and claiming from the defendant 100*l.* part of that sum, the excess of which they abandoned.

The defendant in his defence said that he was not indebted to the plaintiffs in the sum claimed or at all; that the agreement between the parties was that at the end of each voyage the accounts in respect of it should be settled; that they had been settled accordingly and that all moneys due to the defendant, and no more, had been paid to him by the plaintiffs in complete discharge and satisfaction of his share of profits or wages for each voyage; and that by virtue of the Merchant Shipping Act, 1894, s. 387 (1), the court had no jurisdiction to hear the dispute, and that the action should be referred to a superintendent of the Board of Trade thereunder.

At the trial evidence was given on behalf of the plaintiffs which went to show that the only agreement between the parties was that contained in the running agreements or logs; that where the voyages, which varied from six to twelve days each, were so unsuccessful that a man's share of the net profits of the catch was less than 3*l.* for the voyage the plaintiffs had advanced to him enough money to bring his share up to that figure, the money so advanced to be repaid by the man out of his shares of the net proceeds of the more successful voyages; that to the knowledge of the defendant and other men part of the money so advanced to them had been deducted from their shares of the net profits of the more successful voyages; and that the sums so advanced were merely loans, the men never having been paid a minimum wage of 3*l.* either per week or per voyage.

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(1) The Merchant Shipping Act, 1894, contains the following provisions:

PART IV.

FISHING BOATS.

. . . . . .

Sect. 387: "(1.) A superintendent shall inquire into, hear, and determine any dispute, either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing boat and any seaman of the boat concerning—

"(i.) the skipper's or seaman's wages or his share in the profits of the voyage or trip or a fishing catch, or any deduction therefrom; . . . .

if any party to the dispute calls on him to decide it, and his decision thereon shall be final and binding on all persons."

. . . . . .

"(4.) A superintendent for the purpose of hearing and determining any such dispute shall have all the powers of a Board of Trade inspector under this Act."

Sect. 388, sub-s. 1, provides that where any member of the crew of a fishing boat is paid by a share in the catch, the owner of the boat shall render to him a full and true account, in a form approved by the Board of Trade, showing the amounts for which the fish have been sold, and deductions from those amounts.

Sect. 399 and following sections provide for the making and form of the fishing boat's agreement.

Sect. 407 provides that every erasure, interlineation or alteration in a fishing boat's agreement, with certain exceptions, shall be wholly inoperative unless proved to have been made with the consent of all persons interested therein.

The defendant gave evidence in support of his defence, and further stated that the agreement between the plaintiffs and himself was contained not only in the running agreements, but in these agreements as added to or altered verbally or by written notice; that the agreement was that he should be paid a minimum wage of 3*l.* a voyage in addition to a share of the net profits; that he had objected to the deductions being made from his share of the net profits; and that no account had been rendered by the plaintiffs to him pursuant to s. 388 of the Act, and that there had been no settlement of accounts.

The county court judge accepted the evidence given for the plaintiffs in preference to that of the defendant, and found the facts to be as stated on behalf of the plaintiffs, and he accordingly held that unless the jurisdiction of the Court was ousted by s. 387 of the Act of 1894 the plaintiffs were entitled to succeed. He further held that the jurisdiction of the court was not ousted by that section inasmuch as, first, there was here no dispute for a superintendent to inquire into as to any of the matters mentioned in that section; secondly, that no party to any dispute had under that section called on the superintendent to decide it; and, thirdly, that the jurisdiction of the superintendent was not exclusive of that of the county court; and he therefore gave judgment for the plaintiffs for 100*l.*

The defendant appealed on the grounds that the learned judge was wrong in holding that the action was not within the section aforesaid, and that he had jurisdiction to try the action notwithstanding that section.

Digby K.C. (*T. Jenkin Jones* with him) for the defendant, appellant. The county court judge was wrong in overruling the preliminary objection taken on behalf of the defendant that the jurisdiction of the county court to deal with the case is excluded by s. 387 of the Merchant Shipping Act, 1894. (1) That section is comprised in Part IV. of the Act (ss. 369–417), which provides a code for fishing boats, defining and securing the mutual rights and obligations of the owners of these boats and the seamen employed in them. Sect. 387 provides a simple method for the determination of any dispute between the owner and a seaman of a boat concerning (inter alia) the seaman's remuneration, by a superintendent called upon by a party to the dispute to decide it. The section rightly construed gives to the duly appointed superintendent an exclusive jurisdiction, shutting out that of the ordinary courts of law, to determine any case to which it applies. The present case is one to which that section applies. There was here; within the meaning of that section, a "dispute" between the parties concerning the defendant's remuneration. The dispute was as to the agreement for the defendant's remuneration, the plaintiffs alleging it to be that for each trip the defendant should receive a certain proportion of the catch, and the defendant contending that the agreement further provided that where on a trip the defendant's share of the catch fell below 3*l.* he should be paid a sum sufficient to bring his remuneration for the trip up to that figure. The finding of the county court judge that there was no bona fide dispute by the defendant concerning that matter was against the evidence. Apart from the conflicting statements of the parties themselves the evidence tended to support the contention of the defendant rather than that of the plaintiffs. The half-yearly running agreements in writing which were said by the plaintiffs to constitute the contract between the parties were not alike. The form of the first of them was departed from in those which followed it, and they were not consistent with each other. There were erasures and alterations in material parts of these documents which were not shown to have been made with the consent

(1) See note (1) ante, p. 679.

of the defendant and these were therefore by s. 407 wholly inoperative. That there was a dispute between the parties as to the remuneration of the defendant appears further from the fact that no account in a form approved by the Board of Trade of the value of the defendant's share in the catches was ever rendered by the plaintiffs to the defendant pursuant to s. 388 of the Act, and that there was no formal settlement of account of the wages due to the defendant. It was the duty of the plaintiffs as the parties who were taking action to call upon a superintendent to determine the dispute pursuant to s. 387, and the fact that the plaintiffs have failed to perform that duty cannot disentitle the defendant to rely upon that section. These circumstances bring this case within s. 387, and exclude the jurisdiction of the county court.

[SLESSER L.J. referred to Maxwell on the Interpretation of Statutes, Chap. V., sect. 1, as showing that there is a presumption against a statute ousting the jurisdiction of a Court in the absence of a clear provision to that effect.]

The case of *Reg.* v. *Southend County Court Judge* (1) which was cited in the county court on behalf of the plaintiffs has no application to the present case.

O'Connor K.C. and *G. Clark Williams* for the plaintiffs, respondents, were not called upon to argue.

SCRUTTON L.J. This case raises a question of some importance for fishermen who are remunerated wholly or in part out of a share in the fishing catch. The fisherman's agreement provides in many cases that he shall be so remunerated, and under the agreement here in question the defendant was to receive $1\frac{1}{8}$ share of the catch. It is obvious that the fisherman cannot rely upon the amount of the catch alone. The boat may come back from one trip with a very poor catch, and from another with a very large catch. A practice seems accordingly to have grown up by which the fisherman receives 3*l.* a trip as being about the average amount of his share of the catch. That practice having been followed in the present case, a substantial dispute arose between the parties as to the nature of the payment. The defendant says that the agreement was that he should have by way of remuneration a certain share of the catch, and in addition, if that share fell short of 3*l.* a trip, a sum sufficient to bring it up to that amount as a minimum wage. The plaintiffs say that the agreement was that the defendant's wage was to be his share of the catch only, but, as his share might be less than 3*l.*, they would help him by paying him in that case so much money as along with his share of the catch would give him 3*l.* a trip, the money so paid being a loan which the man should repay out of his shares of the more profitable trips or otherwise. The defendant is of course in a difficulty in setting up that he was to be paid 3*l.* a trip as a minimum wage, because there is no mention of a minimum wage in the articles of agreement. The county court judge in dealing with that dispute, which is not before this Court, has found that the arrangement was that the additional payment should be an advance to be repaid, and not part of a minimum wage.

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(1) (1884) 13 Q. B. D. 142.

A point as to the jurisdiction of the Court had previously been taken. It was said that under s. 387 of the Merchant Shipping Act, 1894, a superintendent should be called upon to inquire into any dispute between the owner of a fishing boat and a seaman of the boat concerning the seaman's wages or share in the profits of the catch, and it was contended that that provision excluded the jurisdiction of the county court. In Maxwell on the Interpretation of Statutes, Chap. V., sect. 1, to which attention was called by Slesser L.J., it is stated that there is a presumption that the jurisdiction which a Court had before the passing of an Act is not excluded by the Act without clear words of exclusion in the Act. In the view which the county court judge has taken of it this is really a claim for money lent by the plaintiffs to the defendant in respect of trips where the catches have been poor on the terms that he should repay it out of his share of the catches on more profitable trips, or at all events that he should repay it. The county court has all along had jurisdiction to deal with claims for money lent. In order to exclude its jurisdiction when the money was lent in connection with a fishing trip clear words would be needed. No such words, however, are contained in s. 387 of the Act of 1894, though they are contained in some other Acts, as for example the Friendly Societies Acts. The county court judge has taken the view that there are no words in this section excluding the jurisdiction of the county court. I am of opinion that he correctly took that view, and that the jurisdiction of the county court is not excluded.

The question what was the agreement between the parties is one of fact upon which this Court is bound to accept the finding of the county court judge.

As to the question of jurisdiction, I do not decide what would happen if the superintendent was inquiring into the dispute and at the same time an action to determine it was proceeding in the county court. It is possible that the reasons which lead the Court to restrain or not to restrain an arbitration where there is an action, or to restrain or not to restrain an action where there is an arbitration might be applied to such a case as that. Inasmuch, however, as the superintendent has not been called upon to inquire into this dispute that case does not now arise.

I decide this question on the ground that there is nothing in s. 387 excluding the jurisdiction of the county court to entertain an action which it previously had jurisdiction to entertain.

SLESSER L.J. I agree. On this appeal the only question argued before us is whether or not the jurisdiction of the county court to entertain the action is excluded by s. 387 of the Merchant Shipping Act, 1894. In my opinion the jurisdiction of the county court is not excluded by that section.

In the first place the county court judge has found as a fact that the money sued for in the action was a loan, and in my judgment on that view of the case it does not fall within the section which provides only for the determination of disputes concerning wages. An action for money lent is not one to which the section applies. That is one reason why I hold that the objection to the jurisdiction of the court is not well founded.

Secondly, the superintendent is only required to hear and determine the dispute where a party to the dispute calls upon him to do so. It is not suggested here that either party has called upon the superintendent to hear and determine the dispute. If he had heard and determined this dispute he would have done so without authority under the statute.

Thirdly, even if the subject-matter of this dispute fell within the section and even if the superintendent had been called upon to determine it, I find nothing to prevent proceedings started in the county court for the purpose of having the dispute determined there from being perfectly valid. The jurisdiction of the county court to hear and decide an action for money lent does not arise out of the Merchant Shipping Act, 1894, but is part of the ordinary jurisdiction of the court, which exists altogether apart from that Act. There are no words in s. 387 or elsewhere in the Act which exclude the exercise by the county court of that ordinary jurisdiction.

For the reasons stated by my Lord, and on the principle that a strong leaning exists against construing a statute as ousting jurisdiction without explicit expression of intention: per Lord Campbell in *Scott* v. *Avery* (1); Maxwell on the Interpretation of Statutes, Chap. V., sect. 1. It seems to me that there is no ground for supposing that in such a case as this the jurisdiction of the county court was to be excluded. There may no doubt be cases involving disputes as to fishermen's wages which can only be determined by a superintendent duly appointed under s. 387, but this is not a case of that description.

I am of opinion that the objection taken to the jurisdiction of the county court fails, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *J. Evan Rowlands, Swansea.*

Solicitors for respondents: *Peacock & Goddard, for Eaton Evans & Williams, Milford Haven.*

(1) (1856) 5 H. L. C. 811.

J. R.

1930
Feb. 4, 5, 17.

BARRATT *v.* RICHARDSON AND CRESSWELL.

[1928. B. 395.]

Landlord and Tenant—Recovery of Possession—Breach of Covenant—Rent payable on Usual Quarter Days—Right of Re-Entry when Rent " in Arrear for 21 *Days "—Failure to pay Rent for Thirteen Years—Whether Action for Possession Statute Barred—When "Right to Re-enter first accrued" —Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1—*Cessation of Proceedings on Payment into Court of " All the Rent and Arrears "—Amount of Arrears Payable—Relief—Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 42—*Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 3—*Common Law Procedure Act,* 1852 (15 *&* 16 *Vict. c.* 76), *s.* 212—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 46.

By an indenture of lease dated February 9, 1909, the predecessor in title of the plaintiff demised certain premises to the defendant, R., for the term of ninety-nine years from December 25, 1908, at a yearly rent of 6*l.* 6*s.*, payable quarterly on the usual quarter days. R. covenanted for himself and his assigns to pay the rent on the said days, and it was provided that, if and when any part of the rent should be in arrear for twenty-one days, whether the same should have been legally demanded or not, it should be lawful for the lessor to re-enter upon the premises. On April 30, 1924, the term became vested in the defendant, C. Neither on December 25, 1914, nor thereafter to the date of the writ, did either R. or C. pay to the plaintiff the rent due under the lease. In an action by the plaintiff for possession of the premises, begun on January 28, 1928 :—

Held, that, although the plaintiff's right to re-enter upon the premises first accrued to him in respect of the non-payment of rent on December 25, 1914, his claim to possession was not barred by s. 1 of the Real Property Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), as not having been made within twelve years next after the time at which the right to make such entry had first accrued, but that his right to re-enter accrued afresh in respect of each subsequent quarter day whenever any part of the rent reserved under the lease was in arrear for twenty-one days, and he was, therefore, entitled to rely on the last non-payment of rent before writ issued or any previous non-payment up to twelve years before writ.

Doe d. *Mannion* v. *Bingham* (1841) 3 Ir. L. Rep. 456 discussed and not followed.

Held, further, that the case was governed by s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 42), which provides that all actions for debt for rent there mentioned shall be commenced and sued within twenty years after the cause of such action, but not after, and not by s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), which provides that no arrears of rent shall be recovered by any action but within six years next after the same shall have become due, and that, therefore, the defendant, C., would have to pay or tender to the plaintiff all, and not merely six years of, the arrears of rent owing under the lease in order to defeat the plaintiff's claim by recourse to s. 212 of the Common Law Procedure Act, 1852, and to obtain relief under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925.

ACTION tried by Wright J. without a jury.

By an indenture of lease dated February 9, 1909, and made between one James Watts and the defendant, Daniel Henry Richardson, James Watts, being the owner in fee simple in possession of certain premises known as 20 Beechcroft Road, Wandsworth, in the county of London, demised the premises to Richardson for the term of ninety-nine years from December 25, 1908, at a yearly rent of 6*l.* 6*s.*, payable quarterly on the usual quarter days. Richardson covenanted for himself and his assigns to pay the rent on the said days and it was provided that, if and when any part of the rent should be in arrear for twenty-one days, whether it should have been legally demanded or not, it should be lawful for the lessor to re-enter on the premises.

By an indenture dated September 27, 1909, James Watts assigned the premises and his interest in them and the reversion dependent on the term to two assignees who, by an indenture dated October 28, 1914, assigned the same to the plaintiff. On April 30, 1924, the term became vested in the defendant, Mrs. Louisa Alice Jesse Cresswell, as assignee thereof and, at the time of the present proceedings, she held possession of the term and of the premises.

Neither the defendant, Richardson, nor the defendant, Cresswell, had paid to the plaintiff the rent due under the lease on December 25, 1914, or thereafter, the arrears at the date of action brought amounting to 63*l.* odd.

The plaintiff claimed possession of the premises and the arrears of rent.

The defendant, Richardson, did not appear. By her defence the defendant, Cresswell, denied that the plaintiff was entitled to possession of the premises. She brought into Court the sum of 29*l.* odd, being so much of the rent unpaid as fell due within six years before the beginning of the action, and said that, by her solicitors, she had tendered to the plaintiff, before the beginning of the action, six years' arrears of the rent claimed. She denied that she was liable to pay the balance of 34*l.* odd and pleaded that any right of the plaintiff to recover the same by means of the proviso for re-entry contained in the lease was barred by the Statutes of Limitation.

H. G. Robertson for the plaintiff. The plaintiff is entitled to possession of the premises since he brings this action "within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit," first accrued, within the meaning of s. 1 of the Real Property Limitation Act, 1874. (1) Where, as here, rent is payable

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(1) By the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 3: "In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) . . . . when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

Sect. 42: "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent . . . . shall be recovered by any distress, action, or suit, but within six years next after the same . . . . shall have become due. . . ."

By Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 42), s. 3: "All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty . . . . shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, ... within twenty years after the cause of such actions or suits, but not after. . . . ."

By Common Law Procedure Act, 1852, s. 212: "If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, ... or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued. . . . ."

By Real Property Limitation Act, 1874, s. 1: "No person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at on certain specified days, a new cause of action within the section accrues in respect of each default on any one of those days. That would appear from such decisions as *Archbold* v. *Scully* (1), which decided that the right to rent continues although some arrears of the rent are statute-barred ; *Grant* v. *Ellis* (2), which decided that a reversioner can distrain in respect of each unpaid instalment of rent although for more than the period of limitation the rent has failed to be collected ; and *Doe* d. *Davy* v. *Oxenham* (3), where a reversioner was held to be entitled to re-enter at the end of the term in similar circumstances. Overlooking some non-payments of rent cannot deprive the landlord of his right to sue for subsequent non-payments. To be entitled to relief under s. 212 of the Common Law Procedure Act, 1852 (4), the defendant, Cresswell, must pay all the arrears of rent and not only those falling due within the last six years. This is an action within s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 42) (4), where the period of limitation is fixed at twenty years, and not within s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (4), where the period of limitation is six years. An action for rent founded on a deed may be brought within twenty years : Foà on Landlord and Tenant, 6th ed., p. 198 ; and *Darley* v. *Tennant* (5) ; *Donegan* v. *Neill* (6) ; and *Owen* v. *De Beauvoir*. (7)

Norman Armitage for the defendant, Cresswell. The claim for possession in this action is barred by the provisions of s. 1 of the Real Property Limitation Act, 1874, read with those of

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which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

By Supreme Court of Judicature (Consolidation) Act, 1925, s. 46 : "In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery, and if the lessee, his executors, administrators or assigns are so relieved they shall hold the demised premises according to the terms of the lease and without the necessity of any new lease."

(1) (1861) 9 H. L. C. 360.

(2) (1841) 9 M. & W. 113.

(3) (1840) 7 M. & W. 131.

(4) See note (1) ante, p. 688.

(5) (1885) 53 L. T. 257.

(6) (1885) 16 L. R. Ir. 309.

(7) (1847) 16 M. & W. 547.

s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), since the time at which the right to enter or distrain, and to bring the action, first accrued on December 25, 1914, which is more than twelve years before the issue of the writ on January 28, 1928. This appears clearly from *Doe* d. *Mannion* v. *Bingham.* (1) If a man have a power of re-entry under a lease upon non-payment of rent, and no payment of rent be made for the period of limitation, during which time he has not re-entered, he cannot re-enter afterwards and maintain an ejectment during the lease: Sugden's New Statutes Relating to Property, 2nd ed., p. 43. This defendant is entitled to relief under s. 212 of the Common Law Procedure Act, 1852, because she has paid into Court "all the rent and arrears" which are legally recoverable. This is an action to recover arrears of rent "charged upon or payable out of land" within s. 42 of 3 & 4 Will. 4, c. 27, and, therefore, the period of limitation applicable is six years. Sect. 3 of 3 & 4 Will. 4, c. 42, relates to personal actions only: see *Hunter* v. *Nockolds.* (2)

[He also referred to *Moore* v. *Smee and Cornish.* (3)]

Robertson in reply. *Doe* d. *Mannion* v. *Bingham* (1) was wrongly decided. It is inconsistent with *Grant* v. *Ellis* (4), and it has been overruled in *Spratt* v. *Sherlock.* (5)

Cur. adv. vult.

Feb. 17. WRIGHT J. read the following judgment: The plaintiff in this action claims to be entitled to possession of certain premises known as 20 Beechcroft Road, Wandsworth. The premises were let to the defendant, Richardson, under an indenture of lease dated February 9, 1909, for a term of ninety-nine years from December 25, 1908. The plaintiff on October 28, 1914, became assignee of the reversion dependent on the term of the lease. The lease was subject to a yearly rent of 6*l.* 6*s.* payable on the usual quarter days, but by some oversight no rent was paid or received after the

(1) 3 Ir. L. Rep. 456.

(2) (1849-50) 1 Mac. & G. 640.

(3) [1907] 2 K. B. 8.

(4) 9 M. & W. 113.

(5) (1853) 3 Ir. C. L. Rep. 69.

assignment to the plaintiff. Just before these proceedings a claim to the arrears was made. The defendant, Richardson, has not been served and has not appeared and his whereabouts are unknown. The defendant, Mrs. Cresswell, became assignee of the lease on April 30, 1924. The unpaid arrears of rent from October 28, 1914, to the date of the writ amount (less tax) to 63*l.* 17*s.* 10*d.* From the defendant, Mrs. Cresswell, these arrears are, as such, only claimable as from the date of her interest commencing, the defendant, Richardson, being liable under his covenants for all the arrears.

Possession is claimed by reason of these breaches of covenant to pay rent. The defendant, Mrs. Cresswell, resists the claim for possession on two grounds—namely: (1.) because the claim to possession is barred by the Statute of Limitations, since the right to possession first accrued more than twelve years before the commencement of the action which was by writ dated January 28, 1928, that is, on the first breach of the covenant to pay rent in 1914; (2.) that, before action brought, she tendered six years' arrears of rent (29*l.* 8*s.* 10*d.*) and brought that sum into Court, that being all the arrears legally claimable by reason of the relevant period of limitation being six years.

No evidence was called and no documents put in save the lease.

On the first point, that the claim for possession is barred because the right of re-entry for non-payment of rent was not exercised until more than twelve years after the first breach of covenant to pay rent, the matter is agreed to depend on the true construction of s. 1 of the Real Property Limitation Act, 1874. That section was in substitution for s. 2 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), but it must be read with s. 3 of the latter Act, which defines when the right to make an entry shall be deemed, in the different cases set out, to have accrued. The relevant words of s. 3 are as follows: "When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right"—i.e. the right to re-enter, distrain, or bring an action—"shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken." On the construction of these statutory words, when read with the words of the proviso in the lease providing for the right of re-entry for breach of the covenant to pay rent, I should hold, in the absence of authority binding me to the contrary, that the right of re-entry arose afresh, in the words of the lease, "if and when any part of the rent shall be in arrear for 21 days." The breach of covenant is a separate breach on each such occasion and a new right of re-entry occurs each time. When the writ claiming possession was issued on January 28, 1928, there were a series of such breaches, many within the statutory period of twelve years, and I should hold that the plaintiff was entitled to rely on the last such breach of covenant or any other such breach within the period of twelve years.

The writ merely claims possession for breach of covenant to pay rent and the claim for arrears for 13¼ years is a money claim distinct from the claim to possession. The issue of the writ is an unequivocal claim to possession and, if justified, puts an end to the relation of landlord and tenant and no waiver is possible either by the demand for, or the receipt of, rent. The justification for the claim depends on proof of an enforceable forfeiture. The words of the Act are "such right shall be deemed to have first accrued when such forfeiture was incurred" and are not "when forfeiture shall first have been incurred by the first breach of the condition in question." The words "first accrued," in my opinion, are merely inserted to show the absolute identity in time between the right relied on as justifying the forfeiture and the commencement of the statutory period. These words do not, I think, in any way define or limit the actual forfeiture, or the right on which it depends. It is clear that the right to rent continues as long as the relation of landlord and tenant exists: *Archbold* v. *Scully*. (1) However long may be the period during which the reversioner has omitted to collect rent (assuming he has not been dispossessed), the right to rent at each stipulated period recurs, though arrears may cease to be recoverable, and the reversioner is entitled in respect of each unpaid instalment of rent to distrain, as was held in *Grant* v. *Ellis* (1), though for more than twenty years, as the period then was, previously he had failed to collect the rent. Similarly, on the term expiring, the reversioner, even though for more than the full statutory period he has received no rent, may maintain an action in ejectment and re-enter and, indeed, may re-enter at any time within the statutory period which is now twelve years, after his estate became an estate in possession: see *Doe* d. *Davy* v. *Oxenham.* (2)

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(1) 9 H. L. C. 360.

No doubt, these cases depend on the language of other parts of s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), but it would indeed be curious if, in respect of a right to rent recurring quarterly so long as the lease lasts, the lessor were deprived of the right of re-entry for which he has expressly stipulated in respect of each failure to pay rent, merely because, in respect of previous failures, he has not thought fit to re-enter. By overlooking a former non-payment of rent, the lessor cannot on principle, or apart from express words of enactment, be deemed to have waived the right of re-entry in respect of a subsequent failure to pay, any more than in the case of breach of a covenant against sub-letting, or of a covenant to repair: *Doe* d. *Boscawen* v. *Bliss.* (3) In my judgment, so long as the covenant to pay the rent continues, which it must so long as the relationship of landlord and tenant continues, the proviso giving the lessor a right of re-entry remains in force in respect of each breach of that covenant.

Mr. Armitage, in his able argument, has contended that I am bound to construe the statute in his favour by reason of a decision of the Irish Court of Common Pleas in *Doe* d. *Mannion* v. *Bingham.* (4) The decision was under the repealed s. 2 of the Real Property Limitation Act, 1833, under which the statutory period was twenty years, though the wording was similar to that of the corresponding section of the Act of 1874. The Court of Common Pleas stated that the question was whether "a landlord, who has not received any rent from his tenant holding under a lease, for the space of 20 years, is barred by" the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), "from recovering in an ejectment brought for the non-payment of rent." It was held that the matter was determined by the express provisions of the statute and that the landlord was barred. The judges seemed to have been a little troubled by the results of the decision which, applied to the present case, would, it seems, mean that the right of re-entry for non-payment of rent would be lost to the landlord for the remainder of the term of the ninety-nine years lease, notwithstanding the clear words of that lease. Nor has the case been followed. On the contrary, in the Queen's Bench in Ireland in *Spratt* v. *Sherlock* (1) the headnote states that it was there held that a right of re-entry accrued with each successive gale of rent, but the judgments do not justify this note, though observations of the judges in argument seem clearly to indicate that they were not prepared to follow the earlier decision. Crampton J. said (2): "Has the landlord not a new right every six months?" The Court merely ordered a new trial, the judge having non-suited the plaintiff because he had not proved a payment of rent within twenty years. And, in *Crosbie* v. *Sugrue* (3), ejectment was granted for non-payment of rent though more than twenty years had elapsed from the last payment, apparently on the ground that the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2, did not apply to conventional rent reserved under a demise. However that may be, it does appear that *Doe* d. *Mannion* v. *Bingham* (4) has not been followed nor has it been approved in Ireland. Nor in the English Courts has it been followed or approved. It was, indeed, cited in argument in *Owen* v. *De Beauvoir* (5), whereupon Alderson B. said: "They [i.e. the judges of the Irish Court of Common Pleas]

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(1) 9 M. & W. 113.
(2) 7 M. & W. 131.
(3) (1813) 4 Taunt. 735.
(4) 3 Ir. L. Rep. 456.

(1) 3 Ir. C. L. Rep. 69.

(2) Ibid. 70.

(3) (1845) 9 Ir. L. Rep. 17.

(4) 3 Ir. L. Rep. 456, 463.

(5) 16 M. & W. 547, 560.

in fact controverted *Doe* d. *Davy* v. *Oxenham* (1), though they are reported to have stated otherwise. What becomes of the last, or twentieth year's, rent ?" I think that it is clear from the trend of the argument that Alderson B. meant to say that, so long as the lease subsisted, the right of the lessor to avail himself of the right of re-entry in respect of even the last instalment of rent remained. Mr. Armitage relied on the great authority of Lord St. Leonards, who, in his work, Sugden's New Statutes Relating to Property, 2nd ed., p. 43, states: "If a man have a power of re-entry under a lease upon non-payment of rent, and no payment of rent be made for [twenty] years, during which time he has not re-entered, he cannot re-enter afterwards and maintain an ejectment during the lease, although as we have seen, his right to recover the possession at the end of the lease will not be affected by the mere non-payment of rent." Lord St. Leonards says in a note to this passage: "One learned judge [Ball J.] thought this a startling state of things if such were the law: *Doe* d. *Mannion* v. *Bingham*. (2) In this case, according to Alderson B., the judges in fact controverted *Doe* d. *Davy* v. *Oxenham* (1), though they are reported to have stated otherwise: *Owen* v. *De Beauvoir*." (3) Other English text writers have ignored or rejected the authority of that case. I see even in Lord St. Leonards' citation of the case some indication of doubt. On the whole, for the reasons I have given, I think I ought to disregard the authority of *Doe* d. *Mannion* v. *Bingham* (2), by which, indeed, in any event, I am not bound. I decide in this case that the plaintiff is entitled to recover in ejectment, notwithstanding that the first breach of the covenant to pay rent was more than twelve years before the writ. His pleadings leave him open to elect to rely on any such breach, that is, the last non-payment before writ or any previous non-payment up to twelve years before writ.

This conclusion is still subject to the second point taken by Mr. Armitage—namely, that the defendant, Mrs. Cresswell, having tendered before the action and paid into court in the action six years' arrears of rent, has paid all arrears of rent legally due, and, hence, by reason of s. 212 of the Common Law Procedure Act, 1852, the claim to possession must fail. If that contention is erroneous because the tender and payment is insufficient, it must follow that the claim in ejectment succeeds, but she will be entitled after judgment to relief, if minded so to apply, under s. 46 of the Judicature Act, 1925, on certain terms, which will include payment of all arrears legally due as under s. 212 of the Act of 1852. The question is what all the arrears amount to. The plaintiff contends that they must be the full arrears recoverable against the defendant, Richardson, instead of the six years' arrears tendered. Whether the plaintiffs are limited to six years' arrears, or the actual arrears, which are less than twenty years, depends on whether the defendant is justified in her contention that the case is governed by s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), and not by s. 3 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 42). The former Act fixes a period of six years; the latter, one of twenty years. It is well settled that these two Acts, which were passed within three weeks of each other, though the latter—3 & 4 Will. 4, c. 42—came into operation before the former, have to be read together to the extent and with the results stated by Lord Cottenham L.C. in *Hunter* v. *Nockolds* (1) as follows: "In some of the cases which have arisen under these Acts, the Courts have treated this provision of the second Act as an exception out of the enactment of the former: the conjoined enactments would in that case be, that no more than six years' arrears of rent . . . . shall be recovered by any distress, action, or suit, other than and except in actions upon covenant . . . . in which cases the limitations shall be twenty years. This appears to me to be the only mode of reconciling the two enactments, and to have been the intention of the legislature." The claim in that suit was for arrears of an annuity charged on lands and it was held that not more than six years' arrears were recoverable, even though the annuity was also secured by a personal covenant which, however, was not sued upon. On the other hand, *Darley* v. *Tennant* (1), a personal action to recover arrears of rent or royalty under personal covenants, was held to come under 3 & 4 Will. 4, c. 42, so that the period was twenty years. When, however, the claim is not on an indenture or specialty, 3 & 4 Will. 4, c. 42, does not apply, but c. 27 does, as in *Archbold* v. *Scully* (2), where equitable rights were in question. The Irish case of *Donegan* v. *Neill* (3) was a simple claim for rent under an indenture of demise and it was held that the period of limitation was twenty years and not six.

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(1) 7 M. & W. 131. (2) 3 Ir. L. Rep. 456.
(3) 16 M. & W. 547, 560, 561.

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(1) 1 Mac. & G. 640, 652.

Mr. Armitage contends that the present case is not an action on the covenant to pay rent in the indenture of lease, and, hence, that the period of six years under 3 & 4 Will. 4, c. 27, s. 42, must apply, because the proceeding is one to recover arrears of rent charged upon or payable out of land, and is not an action of debt for rent upon an indenture of demise. In my judgment, the true position here is not exhausted by either formula. So far as the defendant, Richardson, is concerned, the action is an action of debt upon his covenant to pay the rent under the indenture of demise, and he, if he had been served, could not have relied on any period of limitation except twenty years under 3 & 4 Will. 4, c. 42, s. 3, and that would not have helped him, because the arrears fall within the period of twenty years. So far as the defendant, Mrs. Cresswell, is personally liable for rent, her personal liability is for less than six years' arrears, that is, from 1924. But her position depends on other considerations and I do not see how she either need, or can, be entitled to invoke the six years period of limitation. Her claim is that she has tendered and as a condition of relief paid in all arrears of rent under s. 212 of the Common Law Procedure Act, 1852, but that condition does not mean, I think, arrears due from her personally, nor is she sued for such arrears, but it means all arrears due from the covenantor under the lease, that is,

(1) 53 L. T. 257.

(2) 9 H. L. C. 360.

(3) 16 L. R. Ir. 309.

the defendant, Richardson, who is liable for a personal action on his covenant. Mr. Armitage claims that here there is no question of the personal covenant to pay rent, but the rent in question is that payable out of the land and as a charge on the land, under the reddendum in the lease, so as to fall within the distinction pointed out in the words I have quoted by Lord Cottenham. I think this is a fallacy. The defendant, Mrs. Cresswell, is only concerned in the ascertainment of the arrears of rent legally claimable that she may obtain relief against the forfeiture by paying the amount of all arrears legally claimable and that can only be tested by ascertaining what could be recovered in a personal action for rent against the covenantor, the defendant, Richardson. In such an action the limitation under the Act 3 & 4 Will. 4, c. 27, s. 42, would not be material. One analogy may be found in the judgment of Byrne J. in *Dingle* v. *Coppen* (1), where it was held in a redemption action that the party redeeming must pay all arrears of interest and could not avail himself of the six years limitation.

In my judgment, the defendant, Mrs. Cresswell, fails on this point also and has not tendered and paid into court all arrears of rent so as to avoid the forfeiture, but, if she hereafter desires to be relieved against the order in ejectment, she must (inter alia) satisfy all arrears of rent recoverable under the covenant against the original covenantor.

Judgment for plaintiff.

Solicitors for plaintiff: *Billinghurst, Wood & Pope.*
Solicitors for defendant: *Corsellis & Berney.*

G. F. L. B.

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(1) [1899] 1 Ch. 726.

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1929
Nov. 27, 28.
1930
Feb. 12, 13, 14, 17;
March 12.

[1929. T. 1652.]

Shipping—Charterparty—General Average—Shipowner's Claim—Warranty of Seaworthiness — Exceptions — Spontaneous Combustion — Cargo — Actual Fault or Privity—York-Antwerp Rules, 1924, *r. D—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

Sect. 502 of the Merchant Shipping Act, 1894, provides : " The owner of a British seagoing ship shall not be liable to make good . . . . any loss or damage happening without his actual fault or privity . . . . where any goods . . . . put on board his ship are lost or damaged by reason of fire on board the ship."

The plaintiffs' ship left Cardiff with a cargo of coal under charter for the Plate, and there entered into a charterparty to load grain for ports in the United Kingdom and the Continent. The defendants were indorsees of the bill of lading issued under this charterparty.

In the course of the voyage fire broke out on board in the coal bunkers and a quantity of grain had to be discharged into a lighter. In consequence of the fire damage was caused to the grain, as the Court found, " owing to incandescence of the coal and later owing to the coal being actually on fire before discharge."

The shipowner claimed a general average contribution, but the Court found that the coal was unfit for the voyage and that the vessel was unseaworthy.

Rule D of the York-Antwerp Rules, 1924, which were incorporated in the charterparty, provides that " rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure ; but this shall not prejudice any remedies which may be open against that party for such fault " :—

Held, that the shipowners could not avail themselves of the rule, there being no express words to exclude the warranty of seaworthiness.

Held, also, that the Merchant Shipping Act, 1894, s. 502 (supra), was intended as a shield for a shipowner against whom claims might be made for loss or damage to goods, and that it could not be used by him as a sword to justify claims against cargo owners. Further, that this section had no reference to claims for general average contribution.

Greenshields, Cowie & Co. v. *Stephens & Sons, Ld.* [1908] A. C. 431 followed on this point.

Held, also, on a counterclaim by the defendants for the damage to the grain, that s. 502 (supra) applied ; for while the section requires a causal connection between the loss or damage and the fire on board, this need not be by actual contact if it is operative in fact. Here damage to the grain in the lighter was the direct and necessary consequence of the coal on board being on fire ; and as the fire occurred without the actual fault or privity of the shipowners, they were freed from liability.

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ACTION in the commercial list before Wright J.

The following statement of the facts is taken from the judgment: "In this case the shipowners, the owners of the steamship *Campus*, are claiming against the defendants, who are indorsees and holders of the bill of lading, a contribution in general average. The defence to that claim is an allegation that the ship was unseaworthy, and there are various questions of law raised in connection with that issue. There is also a counterclaim, in which the defendants are claiming against the plaintiffs for loss of or damage to the cargo, and to that counterclaim various answers are raised.

The *Campus* is a modern vessel of 6650 tons dead weight; it has four cargo holds, and in addition a cross-bunker called No. 2A, which is separated by a wooden bulkhead from hold No. 2. Cross-bunker No. 2A is separated from the stokehold by an unprotected steel bulkhead. I shall refer to the bunker arrangements a little later.

The *Campus*, a modern vessel of 6650 tons, left Cardiff on May 11, 1928, with a cargo of coal for Teneriffe, and she had on board sufficient bunkers, 1426 tons in all, which she had taken at Cardiff, and which were calculated to be enough to bring her out to the Plate under the charter and to bring her back at least to the Islands without further bunkering.

The vessel arrived at the Plate without incident, and thereupon proceeded to take up service under the charterparty under which these bills of lading were issued. That charterparty was dated May 16, 1928. It was made between the plaintiffs as shipowners and an Argentine company, Sociedad Anonima Commercial de Exportacion e Importacion (Louis Dreyfus & Cia), Ld., of Buenos Aires, as charterers. Those charterers are not identical in law with the defendants, although they are, as their name would indicate, a closely allied company and became indorsees for value of the bills of lading, which incorporated the terms of the charterparty. Under the charterparty the vessel was to load a cargo of various grain, and was to proceed to one or other of various ports in the United Kingdom or on the

Continent between Bordeaux and Hamburg at certain freight. There are only two clauses to which I need refer in this voluminous document, which is a Centrocon charterparty. One is the exception clause, clause 29, which provides: 'The Steamer shall not be liable for loss or damage occasioned by the Act of God, by Quarantine Restrictions, by Perils of the Sea, or other Waters, by Fire from any cause or wheresoever occurring, by Barratry of the Master or Crew,' and various other perils, 'or any Latent Defects in Hull, Machinery or Appurtenances, by Collision, Stranding or other Accidents arising in the Navigation of the Steamer even when occasioned by the negligence, default or error of judgment of the Pilot, Master, Mariners or other Servants of the Shipowners or persons for whom they may be responsible (not resulting, however, in any case from want of due diligence by the Owners of the Steamer, or by the Ship's husband or Manager).' Then clause 31 provides: 'Average, if any, payable according to York–Antwerp Rules, 1924.' The '1924' has first been struck out and then replaced in type. [The statement of facts then described the position of the bunkers and continued:] No trouble is reported in connection with the coal on the way out. The vessel's first loading port was Rosario, where she loaded 4280 tons of maize. She finished loading on June 28, or early on June 29, 1928, and she actually sailed to her next loading port, which was Villa Constitucion, during the course of June 29. In the early morning of June 29 a fire broke out in the port pocket bunker, which then contained two and a-half to three tons, and the plates became red hot. The fire was shovelled out and extinguished with water, or was extinguished with water and then shovelled out, and the vessel went on her voyage. She began to load at Villa Constitucion, and while there a second fire broke out on June 29 in the port casing. That fire was more or less limited in its area. The fire was put out, and about a ton of coal had to be shovelled out. The loading proceeded and was finished in due course, and on July 1 the vessel started off again on her voyage. The captain and the engineer, according to their evidence, went round the stokehold bulkhead and felt whether the stokehold bulkhead was hot or not in order to see if there was heating in the port reserve bunker. But they took no further steps to investigate the condition of the coal in that port reserve bunker, which was an important bunker, holding about 100 tons. It had a door into the stokehold, and the coal from that bunker was not being used; the top hatchway was covered up with the coal in the port reserve bunker.

The ship got to the Martin Garcia Bar, where she was held up for want of water. She arrived and anchored there on July 2. On July 4, while she was still waiting, those on board the ship experienced a strong smell from No. 2A cross-bunker, which they said was like heated maize or coffee. At first they put it down to wet maize. They took the hatch off and could not see anything wrong because the top appeared to be all in order, and at that moment they did nothing further. On the next day, July 5, there was noticed a thick stream of smoke from the ventilator of the port reserve bunker, and the after-side of the bunker, that is to say the unprotected steel bulkhead, in the stokehold, was found to be hot. The captain thereupon diagnosed that the coal was on fire and he flooded the bunkers. The fumes at the same time continued to proceed from the maize. On July 6, from consultation by telegram or wireless to the surveyors and agents, it was decided to proceed to Monte Video. The crew at that time were working at the coal in the reserve bunker which was burning and flooding it with water. On July 8 the vessel arrived at Monte Video. Meantime, fires kept breaking out in the reserve bunker. The coal was being worked out on to the deck and water was being constantly thrown on to it and some of the coal was thrown overboard. It was decided to discharge the grain from No. 2A, which was obviously a perfectly proper step to take, just as it was perfectly proper under the circumstances to proceed to Monte Video as a port of refuge. The coal in the port reserve bunker was burning and the maize was heating. In the two holds, Nos. 2A and 2, which were only separated by wooden bulkheads, there was 2400 tons or thereabouts of maize, and it was obvious to any one that the safety of the ship and cargo were being imperilled unless the fire was stopped in the reserve bunker, and the heated maize was taken out to be reconditioned or cooled. On July 9 the coal was still burning, and there was a fierce heat from the reserve bunker. A commencement was made of working the maize into lighters. On July 10 the coal was still burning and the discharge of the maize was still going on. On July 11 there was a fierce fire in the bunkers, and the discharge was continued. On July 12 the bunkers were still on fire, and the discharge of the grain into lighters was going on. On July 13 they came to burning maize in the cross-bunker in the corner against the port reserve bunker. That evening there was still a fierce fire in the maize, but by 2 o'clock that afternoon the fire in the bunker had been completely extinguished. On July 14 the discharge went on and was completed. On July 15 the ship was left to cool down a little, and on July 16 the bunkers were reshipped—that is to say, they had not been thrown overboard, but were put on deck and were brought back into the port reserve bunker—and a commencement was made of reshipping the maize. These operations went on on July 17 and 18, and they were finished on July 19, when the vessel sailed. About 500 tons were discharged into various lighters, and about 350 tons or perhaps rather more, were reloaded. What was not reloaded was a quantity of about 131 tons which was loaded into one of the lighters, and that took fire on July 14. While it was in the lighter it had to be flooded with water to stop the fire, and it was in such a condition that the best thing to do was to sell it there and then. That was done, and the amount realized was 180*l.* The vessel took sixty tons of coal on board before she sailed from Monte Video. She took some further bunkers at St. Vincent on her way home and she arrived at Hamburg on August 25, after this prolonged voyage. The only other incident which I have to notice is that on August 18 and 19 fumes were found to be coming from the maize in Nos. 2 and 3 holds, which undoubtedly was heating. That had nothing to do with the fire which I

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have already been describing; but that damage is the subject of an item in the counterclaim, with which I shall have to deal. It is not now disputed that the heat of the maize was due to the effect of the coal in the port bunker. I need not examine the circumstances which point to that conclusion, which was the conclusion arrived at by those on the spot."

Clement Davies K.C. and *Simey* for plaintiffs.

Sir Robert Aske (*Martin Vaughan* with him) for defendants.

The arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

March 12. WRIGHT J. [after the above statement of fact, read the following judgment:] The plaintiffs' claim is for a general average contribution, to which the defendants reply that on the principle of *Schloss* v. *Heriot* (1) such a claim cannot be sustained, as the ship was unseaworthy and that the general average expenditure was caused by that unseaworthiness. The principle is well stated in *Kish* v. *Charles Taylor Sons & Co.* (2) by Lord Atkinson, and it is also stated in *Strang, Steel & Co.* v. *A. Scott & Co.* (3) What is alleged as unseaworthiness is the condition or character of the coal at the date or dates of loading in the port reserve bunker in close proximity to the grain in hold No. 2A, which was only separated from the grain by an unprotected steel bulkhead. It was contended that the ship was not unseaworthy in this respect, although perhaps not very strenuously. The coal no doubt was of a class usual for bunkers and of the recognized first rate quality; but situated as it was and at the time when the cargo was loaded and the voyage commenced, it was, in my judgment, unfit for safe carriage and rendered the ship unseaworthy. No expert evidence was given as to the mode in which coal comes to suffer from spontaneous combustion. In the present case the coal in the port reserve bunker had remained confined in the ship since the previous May and had thus passed through the Tropics.

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(1) (1863) 14 C. B. (N. S.) 59; 32 L. J. (C. P.) 211.

(2) [1912] A. C. 604, 620.

(3) (1889) 14 App. Cas. 601.

[After reviewing the circumstances leading up to the heating of the coal his Lordship said that upon the evidence he could not arrive at any conclusion save that the coal was unfit for the voyage and that the ship was, in that respect, unseaworthy. He continued:]

Mr. Clement Davies then relied on the exception in the charterparty with regard to latent defects in the hull, machinery, or appurtenances. I do not think this exception helps him in this case. In the first place, these words cannot be applied to the liability of the bunker coal to spontaneous combustion without an unnatural and pedantic use of language foreign to a contract such as this, and, furthermore, whatever be the precise limitation of the term "latent defects," I do not think the character of this coal can be described as "latent" when regard is had to the two small bunker fires which had already occurred before sailing; an investigation of the coal in the reserve bunker could have been made, though it would have involved some trouble and perhaps delay, and the proximity of this coal to the maize was obvious, and small bunker fires are not unknown in the Plate. But in any case the term "latent defects," without express words applying it to the commencement of the voyage, does not exclude the warranty of seaworthiness: see *The Christel Vinnen.* (1) Furthermore, a specific exception in a charterparty or bill of lading such as "latent defects" does not affect questions of contribution in general average. It was so held in *Schmidt* v. *The Royal Mail Steamship Co.* (2) in the analogous case of an exception of fire. The position is different where the shipowner is excused by the contract from liability for negligence or breach of the warranty of seaworthiness, as was held in *The Carron Park* (3) and *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London* (4), because in such cases the shipowner is entitled to say that he stands free of the breach of duty which is not to be charged against him as barring his claim to contribution or any other purpose. An exception like fire, or perils of the sea, or latent defects does not give him rights to claim contribution, but merely, by express terms, relieves him from liability to loss or damage, as carrier.

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(1) [1924] P. 208.
(2) (1876) 45 L. J. (Q. B.) 646.
(3) (1890) 15 P. D. 203.
(4) [1900] 2 Q. B. 540.

Mr. Clement Davies has still two further points in answer to the defence of unseaworthiness. His first is that Rule D of the York–Antwerp Rules, 1924, which are incorporated in the charterparty, applies. Rule D is in these terms: "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault." Mr. Clement Davies contends that the word "fault" is prima facie wide enough to cover a breach of warranty of unseaworthiness. This clause, however, has only effect between the plaintiffs and defendants as a term of the contract of carriage, and must be read as a part of that contract. But on often repeated authority, for instance, *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (1), the warranty of seaworthiness can only be excluded in such a contract by express and unambiguous words. No such words are to be found in Rule D, and hence the shipowners cannot avail themselves of the rule in a case of unseaworthiness where the contract is, as here, an unusual contract containing no express exception of unseaworthiness. The word "fault" is not apt to excuse a breach of warranty of seaworthiness. In addition, I think that in this case the last words of Rule D would apply, so that if the shipowner could claim contribution, the cargo owners could claim back a similar amount as damages for breach of the contract and hence the shipowners' claim would be dismissed to avoid circuity of action, as contemplated in *Schloss* v. *Heriot*. (2) No doubt this would involve, by applying what I think to be the rules of the English law in interpreting contracts of carriage, that the second part of the rule would here nullify the first part. But the clause

(1) [1908] A. C. 16.

(2) 14 C. B. (N. S.) 59; 32 L. J. (C. P.) 211.

is a document which might be incorporated in contracts of sea carriage depending on other systems of law, in which different rules of construction may prevail. In any case the final words of the rule are quite general and may well mean that if the goods owner has to disburse money, even to the shipowner, as a general average contribution necessitated by a breach of contract by the shipowner, his right to recover that loss or damage for the breach is not to be prejudiced. This contention fails and equally, in my judgment, does the further contention of Mr. Clement Davies based on s. 502 of the Merchant Shipping Act. Sect. 502 is in these words: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." No doubt in this case there was fire on board the ship and no doubt the general average expenditure occurred by reason of that fire. But the section is expressed and intended as a weapon of defence by a shipowner against whom claims are made for loss of or damage to goods. The plaintiffs seek to use it here as a weapon of offence to justify claims by them against the cargo owners, and, furthermore, not in respect of claims to loss of or damage to cargo, but loss to their pockets. The language of the section entirely fails in my judgment to meet such a case as this, and indeed it has been held in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (1), that the section has no reference to claims in contribution to general average which deal, not with claims for loss of or damage to goods, but with claims for the sharing of voluntary sacrifices or expenditure on the equitable principles of the sea law among the various parties to a maritime adventure. *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (1), is a fortiori, because there the claim was against the shipowner who sought to rely on the section as a defence, whereas here the claim is by the shipowner who seeks to rely on the section to support his claim. I think the defence succeeds and that the plaintiffs' claim fails.

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(1) [1908] A. C. 431.

It now remains to consider that part of the counterclaim which includes a claim for loss and damage to the cargo loaded on one of the lighters, either for the whole loss sustained to the 131 tons or thereabouts, or to the proceeds of the salvage—namely, 180*l.* The total of this claim is 1245*l.* The claim for the proceeds of sale is not resisted by the plaintiffs, but as to the other claim, the plaintiffs rely on s. 502 of the Merchant Shipping Act, 1894. Sir Robert Aske denies the application of that section for various reasons—namely, that the damage, if by fire, was not by reason of fire on board, and indeed that there is no sufficient proof of fire on board the ship, but only of heating, so far as concerns these goods, and, therefore, that the plaintiffs have not established that the loss occurred without their actual fault or privity. It is established that the unseaworthiness of a ship does not debar the shipowner from relying on the section, even if the unseaworthiness causes the loss or damage: *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1) In other words the section in expressing the condition, " Without the owners' actual fault or privity," has excluded any other condition. It is clear that fire due to spontaneous combustion constitutes a case of fire within the bill of lading exception of fire or an insurance against fire (if questions of inherent vice are excluded) or of fire within s. 502 of the Merchant Shipping Act: *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2) In *The Knight of St. Michael* (3) a loss of freight through heating of cargo was held to be a loss, not indeed by fire, but within the general words of the policy as ejusdem generis. Mere heating, which has not arrived at the stage of incandescence or ignition, is not within the specific words " fire."

Sir Robert Aske has contended that there was no incandescence or ignition at any time material to the maize loaded into the lighter. The facts to be considered here are

(1) [1915] A. C. 705.
(2) [1908] A. C. 431.
(3) [1898] P. 30.

that there was actual ignition observed in the reserve bunker as early as July 6, and I should, if necessary, be prepared to find as a matter of inference, that there was at least incandescence in the coal in that space before July 4, when the heating in the maize, which was caused by the coal, was observed. The discharge of the maize from hold No. 2A began on July 9, when the coal in the bunker was still bursting into flame. There is no evidence when this particular lighter was loaded, and the fire on it was not observed until July 14; but the discharge of the maize was necessary, because the maize in the hold was heating by reason of the fire in the coal, and the fire in the maize which broke out on the lighter must have been by reason of at least seeds of fire having been communicated to it by heating from the burning coal before discharge.

Precise proof cannot be expected, and Sir Robert Aske has contended that no part of the heating of the maize may have been caused by the coal heating before it became incandescent, so that it cannot be said that the heating of any specific part of the maize was due to fire and not to coal simply heating. This is a narrow ground, and the fairer inference seems to me to be that the heating of the maize was due to the incandescence of the coal originally at the back and corner of the bunker, and later to the actual burning coal some days before discharge. The words of the section require, indeed, a causal connection between the loss or damage and the fire on board. The causal connection need not be by immediate contact, if it is operative in fact. Thus in *The Diamond* (1) damage due to smoke and water used to quench fire was held to be within the section as damage caused by reason of fire. I do not think the damage need be consummated on board the ship, since the words "on board" are to be construed with the word "fire" and not with "loss and damage." In the earlier statutes the words were "fire happening on board," and I do not think that the omission of the word "happening" was intended to change the effect of the section. In the present case I think

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(1) [1906] P. 282.

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the damage and loss of the maize in the lighter was the direct and necessary consequence of the coal on board being on fire, and I, therefore, think that so far the statute applies. The case cited, *Morewood* v. *Pollok* (1), a case of a fire occurring on a lighter on its way to be shipped on the vessel, is obviously different.

There remains the question whether the plaintiffs have established that the loss occurred without their actual fault or privity. The onus to do so is on them: *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (2) and *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (3) The plaintiffs are a limited company. But it is now established that an incorporated body can, for the purposes of this section, be deemed guilty of actual, that is personal, negligence such as can be attributed to the corporate entity even though in a sense that body can only act through agents, whereas the actual fault postulated must not be the negligence or failure on the part of some servants or agents. In such cases it is established that the Court must ascertain as a matter of fact, in all the circumstances of the case, what is the head or brain, or central or governing management of the company, and whether the erroneous or faulty decision falls within the purview of that authority. The plaintiff company have three directors who are also members of the firm of Sir William Seager & Co., and who managed the company's affairs. I find that these three persons, either as directors or as managers, or more correctly in their dual capacity, are those whose fault or privity, if any, in managing the affairs of the company, may properly be ascribed to the plaintiff company as the company's actual fault or privity, and it is in that capacity, as I think, that Mr. G. L. Seager has given evidence.

Sir Robert Aske does not urge that the failure of the master to investigate the condition of all the bunkers on the ship can, in itself, be deemed to be the actual fault or privity of the plaintiff company; that is clearly the fault of a

(1) (1853) 1 E. & B. 743; 22 L. J. (Q. B.) 250.

(2) [1914] 1 K. B. 419.

(3) [1912] 1 K. B. 229.

servant, assuming it to be a fault. Nor can it, I think, be truly held that there was any fault in bunkering the ship at Cardiff for the round voyage, or at least as far as back to the Islands. No doubt there had been occasional fires in bunkers in the Plate where bunkers had been shipped at Cardiff or other European points of departure; but there is no evidence that these had been serious or other than the master and his crew could cope with, neither ship nor cargo being in peril. That was how the master and engineer regarded the small fire before sailing. The managers followed the usual practice of the trade in regard to bunkering and shipped the best bunkers, of first rate reputation. No doubt the motives of economy have determined this practice, without which presumably freights in this trade would be higher. [His Lordship then considered the argument of Sir Robert Aske for the defendants that the managers of the plaintiff company were at fault in not giving specific instructions to the master as to what he should do if fire appeared in the bunkers before sailing. As to this point his Lordship said: A survey might well not have revealed the danger. If I do not feel able to say definitely that the master was in fault in doing as he did, I do not feel able to say that the managers were in fault in not imposing on the master a specific instruction. He then continued:] The two cases principally relied upon by Sir Robert Aske were of a different character. In *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1) the management were fully cognizant of the age and state of the boilers of the vessel and had information showing their inadequate and defective condition and yet did not order new boilers. That was a matter perfectly within the knowledge and scope of the management and was held to involve actual fault or privity of the owners. In *Standard Oil Co. of New York* v. *Clan Line Steamers* (2) the master, though an experienced seaman, was in fact quite inexcusably ignorant that the steamer was liable to capsize if in a particular trim; there had been a disaster due to that liability in the case of another similar steamer some years

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(1) [1914] 1 K. B. 419.

(2) [1924] A. C. 100.

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before, but though the builders had sent a full explanation and warning to the owners, these vessels being a special construction, the owners had not passed it on to the master. It was held that the failure to warn the master was actual fault or privity of the owners. In that case it was held that the matter in question involved a question of scientific calculation which might well be beyond the scope of a ship's master. But in the present case, in my judgment, if the emergency arose of a bunker fire at the Plate, the managers might well feel that it could be left to the practical sense and experience of the master charged as he was with the safety of the lives and ship and cargo, and with means of consulting surveyors on the spot. I find that there was no actual fault or privity in the plaintiff company, and that they have discharged the onus which rests upon them.

Sir Robert Aske has reserved for argument hereafter, if need be, the point decided by the Court of Appeal in *Ingram & Royle, Ld.* v. *Services Maritimes du Tréport, Ld.* (1)—namely, that the terms of a contract of carriage such as this do not exclude the operation of s. 502. There, as here, there was an express exception of fire, but no exception of unseaworthiness. The Court of Appeal held that the shipowner was not barred from relying on s. 502, rejecting the somewhat paradoxical argument that words intended to reduce the shipowner's liability should be deemed to increase it.

I hold that the defendants' claim for 1245*l.* fails.

[As to the second head of counterclaim for 247*l.*, alleged by the defendants to be due from the plaintiffs owing to delivery of part of the maize in a damaged condition, his Lordship held upon the pleadings that this was undefended and that the defendants were entitled to judgment for that amount.]

Judgment for defendants on claim and part of counterclaim.

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants: *Ince, Colt, Ince & Roscoe.*

F. P. F.

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(1) [1914] 1 K. B. 541.

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Revenue—Super-tax—Residuary Legatee—Residue—Outstanding Mortgage—Completion of Administration—Ascertainment of Residuary Trust Fund—Assent of Executors—Income of Estate—Income credited in Account in respect of Capital of and Interest on Advancements to Beneficiaries—Income for Super-tax Purposes—Costs of Appeal in Test Cases.

A testator by his will devised and bequeathed all his real and personal estate to executors, whom he also appointed trustees upon trust to sell and convert, with power to postpone, and, after payment of his funeral and testamentary expenses, debts and legacies, to divide the residue amongst his children in equal shares. At the time of the testator's death the estate was subject to mortgages of considerable amount. The executors had from time to time made advances to the children, and were in the habit of crediting a beneficiary's share of the income of the residuary estate in reduction of the interest on and (if sufficient) the capital of the advances to him. One of the testator's sons having been assessed to super-tax for the year ending April 5, 1926, on income which included the sum so credited to him in the preceding year, appealed against the assessment on the ground that the residue had not as yet been ascertained, inasmuch as there was a mortgage on the estate for a large sum, which was still outstanding, and therefore that he had no income from the testator's residuary estate to which super-tax could attach. The Commissioners held that in those circumstances they were precluded by the decision in *Daw* v. *Inland Revenue Commissioners* (1928) 14 Tax Cas. 58 from holding that the residue had been ascertained, and they discharged the assessment:—

Held, by Rowlatt J., that the decision of the Commissioners discharging the assessment must be affirmed.

On appeal:—

Held, by the Court of Appeal (reversing the decision of Rowlatt J.), that the question whether the residue had been ascertained and the bequest assented to by the executors was a question of fact to be determined by the Commissioners and not by the Court; that there was no rule of law that the mere existence of an outstanding mortgage prevented the residue from being ascertained; that the Commissioners had misdirected themselves in law in holding that *Daw's* case (supra) prevented them from coming to a decision on the facts, and that the case must be remitted to them for a finding whether on the facts the residue had been ascertained so as to constitute a trust fund.

Held, also, that *Daw's* case (supra) decided no principle of law, but was merely a decision on the particular facts of that case.

Observations of Lord Haldane L.C. in *Attenborough* v. *Solomon* [1913] A. C. 76, 81, 82, 83, Lord Halsbury L.C. in *Lord Sudeley* v. *Attorney-General* [1897] A. C. 11, 15, 16, and Younger L.J. in *Ex parte Dr. Barnardo's Homes* [1920] 1 K. B. 468, 484 applied.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on December 20, 1928, Vice-Admiral Sir Aubrey Smith appealed against an additional assessment to super-tax of 1066*l.* made upon him for the year ended April 5, 1926. The respondent was a beneficiary under the will of his father Hugh Colin Smith, who died on March 8, 1910.

By his will the testator appointed executors and trustees, made certain specific bequests including an annuity to his widow, and made provision with regard to his share in a partnership.

The material clauses of the will dealing with the residue of the testator's estate were as follows: "I devise and bequeath all the real and personal estate belonging to me or over which I have any power of appointment by will and not hereby or by any codicil hereto otherwise disposed of unto the trustees hereinbefore named upon trust that the trustees or trustee shall retain the same in its present form (including leaseholds or other property of a terminable or wasting nature) without being responsible for loss or otherwise shall collect call in sell and convert into money the said real and personal estate at such time or times and in such manner as they in their absolute and uncontrolled discretion shall think fit but so that any reversionary interest be not sold until it falls into possession unless the trustees or trustee see special reason for sale . . . . shall stand possessed of my residuary estate and the rents and income thereof upon trust in equal shares for all my children living at my death and for all the issue living at my death (who being male attain the age of twenty-one years or being female attain that age or marry) of any child of mine who dies in my lifetime such issue to take through all degrees according to their stocks in equal shares the share or shares which their parent would have taken if living at my death but so nevertheless that the share of any daughter of mine or of the issue of a daughter who may have predeceased me shall not exceed the sum of twenty-five thousand pounds provided always and I hereby declare that all sums of money (not being annual allowances) which I have given or agreed to give or which I may hereafter give or agree to give to or for the benefit of any of my children by way of advancement or on his or her marriage and also any share to which any child of mine or those claiming under him or them may be or become entitled to in the trust fund subject to the settlement made on my marriage shall in default of any direction to the contrary under my hand be taken in or towards satisfaction of the share of such child or of his or her issue in my residuary estate. And also that the said Owen Hugh Smith shall in addition to any such sums as aforesaid be charged in the division of my residuary estate with the further sum of seven thousand pounds and the same and also the said twenty thousand preference shares in the Proprietors of Hays Wharf Ltd. hereinbefore bequeathed to the said Owen Hugh Smith shall be taken in or towards satisfaction of his share in my residuary estate and shall be brought into hotchpot and accounted for accordingly.

"I hereby further declare that it shall be lawful for the trustees or trustee to manage and cultivate or superintend the management and cultivation of my estates at Roehampton and Fleetwood and other the leasehold hereditaments hereinbefore devised and bequeathed to them until the same shall be sold with all the powers in that behalf of absolute owners including power to cut timber and underwood for sale repair and otherwise and to drain and make roads and fences and otherwise to improve and develop the said premises and to lay out my estate at Roehampton and Fleetwood as building estates.

"I declare that none of my said children or their issue shall be at liberty to call for any payment on account of his or her share in my residuary estate unless and until the trustees or trustee shall in their or his absolute and uncontrolled discretion think fit to make a payment in respect of his or her share or be at liberty to question the amount or propriety of any payment made or withheld by my trustees or trustee on account of such share. And I declare that the

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trustees or trustee may exercise or concur in exercising all powers and discretions hereby or by law given to them notwithstanding that they or any of them may have a direct or other personal interest in the mode or result of exercising any such power or discretion."

There were six sons, of whom the respondent was one, and two daughters of the testator entitled to share in the residue. The widow of the testator died in the year 1918.

At the date of death the testator's estate consisted of real estate and personalty, including a reversionary interest, and was subject to mortgages amounting to 74,000*l.* The mortgages could not all be paid off immediately on the death of the testator, and in fact at the end of the year 1924 a sum of 10,000*l.* was still due on the mortgages.

A considerable part of the residuary real estate (including the testator's freehold estates at Fleetwood and part of the testator's freehold estates at Roehampton) at the end of the year 1924 remained vested and unconverted in the executors and trustees upon the trusts declared by the will of the testator of and concerning his residuary real estate. The executors and trustees had at all material times and still were exercising in respect of the testator's said unconverted real estate the powers of management, cultivation and superintendence in the said will contained and had been, and still were, developing parts thereof as building estates.

Much of the personalty was not easily realizable, and it had not all at the date of the appeal been converted into trustee securities or realized under the power of sale contained in the will. The reversionary interest had been sold in 1923.

A loan of 10,000*l.* odd made by the testator to a company in which members of the family were interested, had not been realized at the date of the appeal, as at the date of the testator's death it could not have been called in without affecting the company's position.

The Inland Revenue affidavit for estate duty purposes was lodged in July, 1910, the probate of the will was granted on August 22, 1910, and the residuary account was lodged on October 16, 1914. On October 16, 1914, at least 34,000*l.*

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was owing by the estate on mortgage, and nothing had been then or was at any time set aside to answer the widow's annuity. The amount of estate duty was not finally agreed until May, 1915, and the last payments of estate and succession duty were made in 1923.

All the debts and legacies (other than those of the residue) had been paid before December 31, 1924, except the mortgage debt of 10,000*l.* hereinbefore referred to.

Accounts of the estate were made up to December 31 in each year. These accounts showed amounts debited to the several beneficiaries for advances made to them from time to time, on which the beneficiaries were debited with interest at the net bank rate with a minimum of 5 per cent. The said advances were not always in the form of cash, for sometimes a particular beneficiary wished to take shares in specie, the said shares were taken at their market value, such value being treated as an advance to that beneficiary upon which interest was charged as aforesaid.

Prior to April 6, 1924, upwards of 100,000*l.* had been paid by the executors to the residuary legatees, which sums were treated in the said accounts as advances. Such accounts also showed a credit in the case of each son for any repayment of advances made, and for an amount equal to one-sixth of the net income of the estate for that year. Thus in the case of the respondent the following sums of interest were charged in his account for the year 1924 :—

	£	*s.*	*d.*
On advances of 250*l.* made prior to 1910 .	12	10	0
,, advances of 20,987*l.* 19*s.* 4*d.* made up to December 31, 1923	1049	8	0
,, cash advances of 700*l.* made in quarterly instalments during the year 1924 . .	21	17	6
,, cash advances of 2567*l.* 10*s.* made on June 30, 1924	64	3	9
,, cash advances of 607*l.* 10*s.* made on July 28, 1924	12	19	8

At December 31, 1924, the total amount advanced to the respondent since the death of the testator amounted to

24,862*l.* 19*s.* 4*d.* Credit was given to the respondent in his account for the year 1924 for the sum of 1766*l.* 16*s.*, being the amount equal to one-sixth of the income of the estate for the year 1924, there being included in the computation of that income the amounts debited to the sons for interest. The said sum of 1766*l.* 16*s.* was not paid to the respondent, but only credited to him in the account in reduction of the total amount of the advances made to him. An increased debit balance of 3066*l.* 1*s.* 2*d.* was carried forward. The only payments made to the respondent during the year were the amounts of the further advances made during that year in respect of which the respondent thenceforth paid interest at the rate aforesaid.

Advances had similarly been made from time to time to each of the testator's daughters, and interest had been debited to them thereon at the rate aforesaid. The total sum of 25,000*l.* each, to which the daughters were entitled under the will, had been paid to them in full by May 4, 1922, and from that date no further interest was debited to them.

A statement showed the one-sixth of the net income of estate credited to the respondent for the year ended the December 31, 1924, grossed for the purposes of super-tax and the interest on the advances debited to him. The assessment under appeal was computed on the net balance of 991*l.*, as shown by the statement, to which must be added the sum of 75*l.* paid by the trustees at his request to Miss D. A. Smith, which had already been allowed as a deduction in computing the amount of the substantive assessment to super-tax made upon the respondent for the year ending April 5, 1926, making a total amount of 1066*l.*, the amount of the additional assessment under appeal.

It was contended on behalf of the respondent:

(1.) That at December 31, 1924, the residue of the estate had not been ascertained.

(2.) That at that date the whole of the estate of the testator remained in the hands of the executors and trustees undistributed and without power for any beneficiary to call for a distribution.

(3.) That no beneficiary was entitled to call for any item of income or other asset of the estate.

(4.) That consequently any sums credited by the executors and trustees to the respondent for the year ended December 31, 1924, were not income assessable to super-tax, and

(5.) That the assessment under appeal should be discharged.

It was contended on behalf of the Revenue :—

(1.) That the residue of the estate had been ascertained and converted into a trust fund at latest by the end of the year 1923, in which the last payments of estate and succession duty had been made.

(2.) That the share of the income of the estate credited to the respondent for the year ended December 31, 1924, was assessable to super-tax.

(3.) That the assessment under appeal should be confirmed.

The Special Commissioners gave their decision in the following terms : " We were of opinion that, having regard to the decision in *Daw* v. *Commissioners of Inland Revenue* (1), it was not possible for us to hold that the residue of the estate had been ascertained at December 31, 1924. We accordingly discharged the assessment."

Sir William Jowitt A.-G., *J. H. Stamp* and *R. P. Hills* for the Commissioners of Inland Revenue.

Latter K.C. and *H. B. L. Braund* for the respondent.

ROWLATT J. It is clear from *Lord Sudeley* v. *Attorney-General* (2) and *Ex parte Dr. Barnardo's Homes* (3) that while the estate is under administration, the residuary legatees are not specifically entitled to any asset, and that income accruing during administration, even though they actually receive it after administration, is not, and can never become by relation, their income. On the other hand, when the process of administration is ended, and the executors have declared the residue applicable to the bequest, the principal then existing, which may include sums which have arisen as revenue, becomes by virtue of the assent of the

(1) 14 Tax Cas. 58.

(2) [1897] A. C. 11.

(3) [1920] 1 K. B. 26, 468 ; [1921] 2 A. C. 1.

executors, the property of the legatee, and the income thereafter accruing is his income, and for tax purposes the rules as to relief, as to super-tax, or, in the case of charities, as to refund, apply to it.

When it is said that the executor "assents to a bequest," what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in *Attenborough* v. *Solomon* (1) makes this clear. The assent of the executor, it is important to add, may be inferred, when there is clearly nothing more to be done by way of administration. It only remains to observe that it makes no difference if the principal representing residue, the subject-matter of the executor's assent, remains in the possession of the executor after the administration, and with it his functions as executor, have terminated. I think all this is quite clear, and the question is whether in fact that position has been reached as regards the principal which has produced the income under discussion in this case.

In the cases already referred to it was several times stated that the estate must have been "fully" administered. Mr. Stamp criticized this expression, contending that it could not have been meant to exclude the possibility of an executor assenting to a residue subject to a mortgage being left still outstanding. He justly pointed out that this must often be done where the residue is settled, and is therefore to pass from the executors as such to themselves or to others as trustees, and I agree.

The question here, however, is whether I am to infer (apparently as a matter of law) the assent of the executors in this case. Prima facie, it is for the executor to determine when he shall assent. No doubt, if he improperly withholds it, the matter can be taken out of his hands by the Court; but while it is still in his hands, I do not see that I have any authority to decide that he has assented, unless he has actually done so, or so acted as to involve as matter of necessary inference his having done so.

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(1) [1913] A. C. 76.

Now here I find that there is a mortgage outstanding. It is relatively small, but it has to be provided for. The residue is not settled, but when ascertained stands to be divided de praesenti. In these circumstances the executors have kept what they call an "Advance Account" with the residuary legatees, and have brought into it the income of the assets, which they appear to have divided, practically speaking, as it came in. On the other hand, the account marked C (my copy has no title) seems to show that these "advances" are treated by them as on account, not of income from capital already in equity the property of the legatees under a trust, but on account of the share, whether derived historically from capital or income, which the legatees stand to receive in the division of the residue; and that will be as to the whole of it a receipt by them of capital.

In these circumstances I cannot say that the executors have assented to the residuary bequest having taken effect on the capital, of which these advances (or such part as are derived from revenue account) are the corresponding income. Whether they might or ought to have acted differently, I do not know. The appeal is dismissed with costs.

The Crown appealed. The appeal was heard on February 13 and 14, 1930.

J. H. Stamp and *R. P. Hills* (*Sir William Jowitt A.-G.* with them) for the appellants. The question here is whether a trust fund has been constituted or whether the fact that a mortgage is still outstanding justifies the view that the residue remains in the hands of the executors for administration, so that a claim against a residuary legatee for super-tax is excluded on the principle of *Barnardo's Homes* v. *Special Income Tax Commissioners*. (1) Here the testator had died in 1910 and the assessment to super-tax was for the year ended 1926. The position had to be considered therefore in the year ending April 5, 1925, and the income for that year was for convenience taken at the income for the year 1924. In 1924 all the debts had been paid off except a mortgage for 10,000*l.*, and upwards of 100,000*l.* had been paid to the residuary legatees by way of advancement. Obviously, therefore, the mortgage could easily have been paid off. All succession duty had been paid by 1923. Further the income of the residue has been distributed in the sense that it has been credited towards the payment of interest on advancements and in reducing the capital advanced. Thus for the year 1924 credit was given to the respondent for 1766*l.* 16*s.*, being one-sixth of the income of the residuary estate. That being so, the inference is irresistible that a trust fund had been constituted in that year of which the income was being paid to the beneficiaries and the sum of 1766*l.* 16*s.* must be treated as the respondent's income for super-tax purposes. The whole question is whether a trust fund had then been constituted.

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(1) [1921] 2 A. C. 1.

[LORD HANWORTH M.R. Is that not a question of fact for the Special Commissioners ?]

It would be if they had decided the question as one of fact. They however expressed the view that, having regard to the decision in *Daw* v. *Inland Revenue Commissioners* (1), "it was not possible for us to hold that the residue of the estate had been ascertained at December 31, 1924." They considered *Daw* v. *Inland Revenue Commissioners* (1) to establish that a trust fund could not be regarded as constituted so long as a mortgage remained outstanding. They have misdirected themselves on the law and failed to decide the question as one of fact at all. There was every reason here for holding that the trust fund had been constituted.

In *Daw's* case (1) the Commissioners had held that a trust fund had been constituted but they were overruled by Rowlatt J. It is said that in that case the administration was not concluded, because the estate was subject to mortgages which the executors were entitled to pay off and to retain the moneys in their hands for that purpose.

(1) 14 Tax Cas. 58.

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Rowlatt J. there held the existence of the mortgages prevented the constitution of a trust fund.

[LAWRENCE L.J. It must be a question of fact in each case whether the executors' office has come to an end and the trustees' office has commenced.]

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, sub-s. 1: "Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." Before that Act the real estate would never have vested in the executors as such. Sect. 3 recognizes that executors may assent to a devise contained in a will, subject to a charge being given them for any money which they are liable to pay. The test of when an estate passes out of the executors as such and vests in them as trustees is laid down by Lord Haldane in *Attenborough* v. *Solomon*. (1) What has to be ascertained is the time at which the executors had done all that was due from them as executors and were content that the dispositions of the will should take effect.

[GREER L.J. I do not think that the interests of the residuary legatees arise until the executors have paid the debts.]

It does not follow that because there is a debt outstanding that the executorship has not come to an end.

It is submitted therefore (1.) that the Commissioners have misdirected themselves on a question of law and have misapplied the decision in *Daw's* case (2), and (2.) that, on the facts, the inference is irresistible that the fund had become a trust fund in 1924. Rowlatt J. decided the question in the present case as one of law.

There is here sufficient evidence to enable the Court, without sending the case back to the Commissioners, to hold that a trust fund has been constituted.

(1) [1913] A. C. 76, 83.

(2) 14 Tax Cas. 58.

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Latter K.C. and *H. B. L. Braund* for the respondent. There is here no ground for interfering with the decision of Rowlatt J. The principles of law applicable to the case are fully and accurately stated by him in his judgment. No income can be payable to the residuary legatees so long as the estate is in process of administration. In *Barnardo's Homes* v. *Special Income Tax Commissioners* (1) it was held that until the date when the residue of the testator's estate was ascertained the institution had no property in any specific investment forming part of the estate, or in the income therefrom. So, also, in *Herbert* v. *Inland Revenue Commissioners* (2) it was held that as the estate was still in course of administration up to 1919 at least, the surplus income received up to that date did not belong specifically to the residuary legatees. See, also, *Marie Celeste Samaritan Society of the London Hospital* v. *Inland Revenue Commissioners.* (3) On the accounts in the present case it is submitted that there has been no distribution of income of the residuary estate to the beneficiaries.

[Lord Hanworth M.R. The Court is not bound by the way in which the money has been dealt with by the executors in their accounts. It must look at the facts.]

It is important to see what *Daw's* case (4) actually decided. It is quite untrue to say that it decided that the existence of an outstanding mortgage prevented the ascertainment of the residue and the constitution of a trust fund. There is therefore no ground for saying that the Commissioners misdirected themselves on a question of law.

[Lawrence L.J. I do not see how *Daw's* case (4) has any application to the facts of the present case.]

It indicated clearly to the Commissioners that what they had to ascertain was whether the residuary estate had been constituted subject to the trust.

It would be a great hardship in a case like the present to send it back to the Commissioners. To do so would be to invite them to find something which they have refused to find. All the facts were before them. The Commissioners did in effect make a finding of fact. They found, as a fact, that the residue had not been ascertained at the material date. If they had intended merely to submit to the decision in *Daw's* case (1) as precluding them, in law, from finding that the residue had been ascertained because of the outstanding mortgage, then they would have found that it was not "open" to them, in view of *Daw's* case (1), to find that the residue had been ascertained.

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(1) [1921] 2 A. C. 1.

(2) (1925) 9 Tax Cas. 593.

(3) (1926) 11 Tax Cas. 226.

(4) 14 Tax Cas. 58.

Stamp replied.

LORD HANWORTH M.R. In this case the Crown appeals from a judgment of Rowlatt J., who dismissed an appeal from the Commissioners. The Case is stated in reference to a claim by the Crown by way of additional assessment to super-tax in the sum of 1066*l.* made upon the respondent Vice-Admiral Sir Aubrey Smith for the year ending April 5, 1926. It is claimed that in that year the respondent was in receipt of that sum and that it should be added to his income for super-tax purposes.

The respondent is one of the sons of Hugh Colin Smith, who died on March 8, 1910, and by his will appointed executors and trustees, and made certain specific bequests, including an annuity to his widow. The material clauses of his will are in effect these: that the trustees should retain the estate "in its present form (including leaseholds or other property of a terminable or wasting nature) without being responsible for loss or otherwise shall collect call in sell and convert into money the said real and personal estate at such time or times and in such manner as they in their absolute and uncontrolled discretion shall think fit," and then out of the moneys in the hands of the executors and trustees there is a direction to "pay my funeral and testamentary expenses and debts and pay or provide for any legacy or annuity hereby or by any codicil hereto bequeathed." There is an interpretation clause to the will which makes the executors equal to trustees, and the trustees equal to executors, in the sense that those terms are used, as I gather, interchangeably, but, of course, without

(1) 14 Tax Cas. 58.

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altering the nature of the duties which fall upon persons who stand in that capacity according as they have or have not completed the execution of the will and become trustees in respect of the estate falling under it. Then the will goes on, and declares a "trust in equal shares for all my children living at my death and for all the issue" and so on. Putting it quite shortly, there is to be a division of the residue of the estate in favour of his children. He left six sons and two daughters. There is a limit of the sum which is to pass to the daughters, but the respondent is one of the six sons who take under this bequest of the residuary estate.

Now when he died there was a considerable sum outstanding to which the estate was liable on mortgages amounting to 74,000*l.* A large part of the property which passed under the will consisted of freehold estates at Fleetwood, and other freehold estates at Roehampton, and, reading from the Case, we learn that at the end of the year 1924 a large portion of this real estate in both places "remained vested and unconverted in executors and trustees upon the trusts declared by the will of the testator of and concerning his residuary real estate." The testator died, as I have said, in 1910, and probate was granted of his will on August 22, 1910, and since that time the trustees and executors have carried on the business of looking after his estate. We are told, for instance, that much of the personalty was not easily realizable and that it had not all at the date of the appeal been converted into trustee securities or realized under the power of sale contained in the will, and more than that that there had been a certain number of sales and dealings with this property both at Fleetwood and at Roehampton. During these years the executor-trustees—I use the comprehensive term on purpose—have, of course, kept accounts and we have before us an account showing the receipts and payments on capital account, and also receipts and payments on income account, and we have an account showing a division of income account for the year 1924. The reason why the year 1924 is chosen is stated to be that as the accounts of the estate were made up to December 31 in each year, the super-tax would fall to be estimated according to the previous year's income, and in reference to the super-tax year ending on April 5, 1926, the last complete year before the year of charge would be the year ending December 31, 1924. What is said is this, that taking that year the accounts show that there has been an attribution of income to the respondent of the amount of not less than 1066*l.*, and that so he has, if not received payment, had the advantage of having that sum placed to his credit with the result that it falls to be dealt with as a part of his income for that year. The accounts show that in the case, I think, of each of the sons advances have been made, and in respect of those advances the sons have respectively been charged interest upon them, but, from time to time, and both in the year 1924 and subsequently, there has been a sum appropriated to them from the division of income account and taken into account as between the executor-trustees and that particular son so as to reduce the amount apparently owing from the son to the estate, and the amount of the interest which, if interest had actually to be found in specie, would have to be paid up by the son to the estate.

The matter went before the Special Commissioners, and they held that "We were of opinion that having regard to the decision in the case of *Daw* v. *Commissioners of Inland Revenue* (1) it was not possible for us to hold that the residue of the estate had been ascertained at the 31st December 1924." The meaning of that is this—though I will pass to the actual case a little later—that it was said on behalf of the respondent that, although there had been a so-called appropriation of income, on December 31 the residue of the estate had not been ascertained, that at that time the whole estate remained in the hands of the executor-trustees undistributed and without power for any beneficiary to call for a distribution; that no beneficiary was entitled to call for any item of income or other asset of the estate; and consequently that there had been no receipt by the respondent of this sum which was called his income.

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(1) 14 Tax Cas. 58.

That brings one back to look for a moment at the cases. In *Attenborough* v. *Solomon* (1) the question that arose was what was the proper inference to be drawn from the facts as to whether the executors had assented to the trust disposition taking effect so that at the date of the pledge there made and contested it could be ascertained whether or not there had been a valid pledge as against those who contested it. Lord Haldane says (2): "Now, my Lords, the meaning of a residuary account must of course be construed with reference to its purpose. It is not a document which is intended to have the operation of a declaration of trust; but it may be looked at as against the executor as evidence of what he regarded as being the position of the estate"—and he goes on (3): "The real point is, I think, more simple than it was regarded as being by his (Fletcher Moulton L.J.'s) colleagues in the Court of Appeal, and the question is largely one of fact. The general principles of law which govern this case are not doubtful"—and then he deals with the position of the executor, and says: "So soon as he"—that is the executor—"has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels." It is on that rule that the respondent to the present appeal bases his contention that the residue of the estate of his father has not been ascertained and that there has been no vesting in him of the share of the residue which was bequeathed to him by his father's will.

In *Lord Sudeley* v. *Attorney-General* (4) Lord Halsbury L.C. says: "The thing that the legatee was entitled to was one-fourth share of a residuary estate, consisting, it may be, of many things; and I think it was fallacious on the part of Mr. Channell to say that the residue was very nearly ascertained, because the question is not only of amount—although I think that of itself would not be sufficient if it were only of amount—but it is a question of

(1) [1913] A. C. 76.
(2) Ibid. 81.
(3) [1913] A. C. 82, 83.
(4) [1897] A. C. 11, 15.

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substance as well as a question of amount. It is uncertain until the residuary estate has been ascertained of what it will consist"—and a little further on he says (1): "Until the thing has been ascertained, until the trust fund has been constituted, the thing of which the trustees are the trustees has not been ascertained. Whether you treat them, therefore, as trustees or executors, the same consideration arises. Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist."

In *Ex parte Dr. Barnardo's Homes* (2) in the Court of Appeal, Younger L.J. (as he then was) put the matter quite plainly: "What one, I think, has always understood to be the principle applicable to such matters . . . . is this, that until the residue is ascertained, and until its existence as net residue has been acknowledged by the executor, either by payment to the residuary legatee, or, if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that moment of time arrives, subject of course to any interim distribution, to have the estate administered in due course."

I read those passages because they appear quite clearly to lay down that until the fact is ascertained, or can or ought to be inferred, that the residue has become defined so that the aliquot portion passing to the beneficiary can also be defined, the beneficiary has not, until that time, a definite interest in the sum which will ultimately fall to him. Whatever be the contentions of the respondent, it appears to me as Lord Haldane said in the case I first cited that it is largely a question of fact.

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(1) [1897] A. C. 16.

(2) [1920] 1 K. B. 468, 484.

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Now there were facts in this case which were difficult of summation. It is, no doubt, true that there have been these accounts, and that, on the face of them, it looks as if a definite sum had been finally credited to the respondent as income. There has been a dealing with the funds to the advantage of the respondent in a manner which would appear to indicate that the executor-trustees had assented by their conduct to the fact that he had become entitled to an aliquot share in the residue in their hands, and there is a somewhat cogent fact to be found in this, that the last payments of estate duty and succession duty were made in 1923. Now, succession duty would only be paid, or prima facie would only be paid, upon the ascertainment of the beneficial interest which has been the subject of the succession. We have not that succession table or receipt before us, and we are not told upon what sum succession duty was paid, but I can understand a valid argument being put forward that if, in an estate, such a point of ripeness had been attained that the succession duty could be, and had been, paid, that it had reached a point at which there had been an irrevocable estimation of a share which was to pass to the beneficiaries, or at any rate to one of them particularly concerned. On the other hand, there are facts here which show that at the present time what has been going on in the past, ever since the death, is still going on: "The executors and trustees have at all material times and still are exercising in respect of the testator's said unconverted real estate the powers of management, cultivation and superintendence in the said will contained and have been, and still are, developing parts thereof as building estates." It is also true that the will contains a clause "that none of my said children or their issue shall be at liberty to call for any payment on account of his or her share in my residuary estate unless and until the trustees or trustee shall in their or his absolute and uncontrolled discretion think fit to make a payment in respect of his or her share." There were, as I say, mortgage debts due from the estate. There is still a sum of 10,000*l.* due on mortgage. Emphasis has been laid upon that, and it is said that it has been attempted in some cases, and in this case, to rely upon the fact that there was an outstanding mortgage unpaid as connoting that there could not be an estimation or ascertainment of the residuary estate, because the estate was still fluid, as the direction to pay debts has not yet been carried out. For my own part I think this question of a mortgage debt, or any other debt, must take its proper place in perspective. It may be in some cases that that is a factor from which a strong inference may be drawn. It may be, on the other hand, that the device of leaving a debt unpaid is resorted to in order to pretend that the residue of the estate has not been ascertained and is not ascertainable. If such a device were resorted to in any case it ought to be held ineffective. In other words, there may be in this, or in any other case, features which point in one direction or in another, and largely those features are questions of degree and so of fact. What has to be determined here, in considering the year 1924, is: Is it clear that the portion of each of the sons is ascertained, or has been ascertained, or is capable of ascertainment, and that ascertainment has been assented to by the executor-trustees? Rowlatt J., to my mind, correctly dealt with the law, and I agree with his judgment in all that he said upon the matter of law, derived, as it was, from the cases to which I have also referred.

But there still remains a question with which we have to deal, and it is not an easy one. The Commissioners, after stating these facts which, as I have said, point some in one direction and some in another, have said: "We were of opinion that having regard to the decision in the case of *Daw* v. *Commissioners of Inland Revenue* (1) it was not possible for us to hold that the residue of the estate had been ascertained at the 31st December, 1924." The phrase is, perhaps, unfortunate, but these Commissioners are really masters of the law and they are well equipped with a full knowledge of the cases, and they say "it was not possible for us." They do not say, "Having taken into account the various cases, including *Daw's* case (1), we decided upon the facts that the residue of the

(1) 14 Tax Cas. 58.

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estate had not been ascertained." What they apparently say is "that it was impossible for us to hold that the residue had been ascertained because *Daw's* case (1) stood in our way and prevented our reaching that result." Now what did *Daw's* case (1) decide? There was in that case a mortgage, a considerable sum remaining out upon mortgage. The primary contest was whether or not super-tax could be charged for the years from 1921 to 1926, and it was alleged by the Crown that by reason of the fact of the provision in the will that the property was to be divided when the youngest child attained twenty-five—which event happened in 1916—the estate was capable of division at that date. Although that was held to be so by the Special Commissioners, Rowlatt J. rejected that view. He indicates that there were a certain number of facts which could be ascertained and which might point in a different direction, but he holds, first of all, that the will itself had not given a definite punctum temporis at which the residue was to be ascertained and that it must be ascertained aliunde. True, he does give emphasis to what had been a large factor in the winding up of this estate—namely, the reduction of the very large outstanding mortgage debt which had been in existence at the time of the death. Originally the debt had been 78,000*l.*, and by 1925 it had been reduced to 34,000*l.* The whole proceedings of the dealing with the estate, no doubt, had been dominated by the heavy mortgages outstanding in that case, but I feel quite clear that Rowlatt J. did not intend to say in that case, or in any other, that so long as there was outstanding a mortgage debt, or other debt, it could not be held that the residuary bequest took effect or that it was not ascertained or ascertainable.

However, in spite of that case, to my mind in no way falling outside the true rules which have been laid down in the other cases to which I have referred, the Commissioners appear to have taken that decision as laying down some rule which was binding upon them and prevented them from holding that the residue of the estate had been ascertained. I hope it will not be contended in any case hereafter that *Daw's* case (1)

(1) 14 Tax. Cas. 58.

establishes the proposition which we are told it does, and for which it has been cited, in reference to the effect of an outstanding debt. All the relevant matters must be taken into consideration and, as Rowlatt J. says in his judgment in the present case, you may have an assent by conduct: "When it is said that the executor 'assents to a bequest,' what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in *Attenborough* v. *Solomon* (1) makes this clear. The assent of the executor, it is important to add, may be inferred, when there is clearly nothing more to be done by way of administration." The question is, in all cases: Has the administration of the estate reached a point of ripeness at which you can infer an assent, at which you can infer that the residuary estate has been ascertained and that it is outstanding and not handed over merely for some other reason? In the present case the guidance adopted by the Commissioners seems to be one which is a mistake in law. They have not, apparently, found the conclusion which they desired to reach upon the facts. The facts are for them; they are not for us. It is not for Rowlatt J., nor for this Court, to say what the summation of the facts ought to be; what conclusion ought to be reached upon the facts; that is for the Commissioners. I do not desire to say more upon the facts than I have already said, and I wish to leave open every point of fact for the Commissioners. My reference to the facts has only been for this reason, in order to show that there are some matters which point in one direction and some matters which point in another. Those who are charged with the duty of reaching a conclusion upon the facts must reach the conclusion; I cannot.

In these circumstances it appears to us, unfortunately, necessary to remit the case back to the Commissioners with

(1) [1913] A. C. 76.

the indication that *Daw's* case (1) is not to be taken as establishing any definite rule in law, and that the principles—which have been laid down in the cases already referred to, which were, I think, applied in *Daw's* case (1), and which have been stated in Rowlatt J.'s judgment in the present case, with which I agree—must be applied to the facts in this case, and the Commissioners must come to their conclusion upon the facts.

I will only refer to one other matter. We have been told that this case, which does not involve a large sum of money for this year to this particular subject, has been brought forward by way of testing the effect of the decision in *Daw's* case (1), and that as it was a case in which the advisers of the Crown were anxious to obtain a decision they have undertaken to pay the costs of the respondent to this appeal as well as their own costs. That course is obviously right when further Courts are approached, not for the purposes of the particular case so much as for the purpose of getting a general decision applicable to a larger number of cases. We are glad that that arrangement has been made, and we think that, having regard to the further expense involved, it will be a fortunate thing if the Attorney-General will arrange that the further steps in this case are also taken upon the same immunity from costs to the respondent. I say that because we are agreed upon it and it may assist the Attorney-General in carrying that proposal into effect.

The result of this is that the appeal must be allowed and the case must be remitted to the Commissioners for them to come to their conclusion on the question of fact.

LAWRENCE L.J. I agree. The Commissioners' finding in this case is worded as follows: "We were of opinion that having regard to the decision in the case of *Daw* v. *Commissioners of Inland Revenue* (1) it was not possible for us to hold that the residue of the estate had been ascertained at the 31st December, 1924." Mr. Latter has invited us to construe this finding as a finding of fact that the residue of the estate had not been ascertained at December 31, 1924. I do not think that the experienced Commissioners would have worded their finding in the way they did had they intended it to be a finding of fact such as is suggested by Mr. Latter. As I read the finding, it means that, in view of the decision in *Daw's* case (1), it was not open to them to find otherwise than that the residue had not been ascertained on December 31, 1924. If that be the right interpretation of the finding I am of opinion that the Commissioners have misdirected themselves on a matter of law. In my judgment *Daw's* case (1) does not lay down any principle of law, but is a decision which turned entirely upon the special facts of that case. The Crown there sought to make the taxpayer liable for super-tax in respect of large annual sums which the taxpayer had not in fact received. The finding of the Commissioners was " that as from the date in 1916 when the youngest child of the testator W. A. Daw attained the age of twenty-five the appellant must bring into the computation of his total income for super-tax purposes his proportionate share of the income of the estate less annual charges but without deduction for repayment of mortgages." Rowlatt J. after fully examining the facts stated in the Case came to the conclusion that the finding of the Commissioners could not stand. It appears that the date mentioned in the finding of the Commissioners was the date when, under the will, the estate became distributable, and the learned judge pointed out that matters of administration had proceeded after that date. As I read his judgment he either treated the finding of the Commissioners as a finding on a question of law, or else he came to the conclusion that there was no evidence upon which their finding of fact could be supported. That in my opinion is the only explanation of his going into the whole of the facts and finding as a matter of fact that the trust fund had not been ascertained at the date upon which the Crown suggested it had in fact been ascertained — namely, in the year 1920. In my judgment, the decision in *Daw's* case (1) does not govern the present case, nor, as at present advised, do I think that it will govern any other case. The principles of law which govern both *Daw's* case (1) and the present case are not open to doubt. It is only necessary to refer to *Attenborough* v. *Solomon* (2) to see that that is so. The property which on the death of the testator vests in the executor does not remain vested in him for ever. So soon as he assents to the dispositions of the will becoming operative and to the trusts taking effect, the estate vested in him as executor is divested and vests under the dispositions of the will in the trustees of the will. The assent of an executor may be given informally and may be inferred from his conduct. In my opinion, it is a pure question of fact whether such an assent has been given or not, depending upon the particular circumstances of each case, and no case with different facts can afford any true guide for the determination of that question. It has been suggested but not I think seriously contended that the existence of outstanding debts or liabilities negatives the inference of an assent of the executor by conduct. In my judgment, that is not so. Lord Haldane, in *Attenborough* v. *Solomon* (3) states: "The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs virtute officii; and their right in rem, their title of property, had been transformed into a right in personam,—a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision." This statement shows conclusively that the contention that an assent of an executor cannot be inferred, because there is a mortgage debt, or some other liability, outstanding, is not maintainable. Whether there has been an assent or not is a question of fact to be determined on the special circumstances of the particular case.

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(1) 14 Tax Cas. 58.

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(1) 14 Tax Cas. 58.

(1) 14 Tax Cas. 58.

(2) [1913] A. C. 76.

(3) [1913] A. C. 76, 85.

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Now, in the present case the learned judge, after stating correctly that the matter to be decided was a question of fact, says: "The assent of the executor, it is important to add, may be inferred, when there is clearly nothing more to be done by way of administration." As I have already pointed out, this limitation to the inference which may be drawn is not justified, as the assent may be inferred notwithstanding that there are liabilities still outstanding. The sole point to be decided in every case is whether the executors have assented to the dispositions of the will taking effect, which assent may be given notwithstanding that there are debts or other liabilities still outstanding. The learned judge, however, although stating that it was a question of fact for the Commissioners, went on to decide that question of fact. I abstain from commenting upon that part of his judgment, as anything I might say might prejudice the inquiry whether there has in fact been an assent in this case or not.

For the reasons stated by my Lord, and for those which I have stated, I agree with the order which my Lord has suggested, and concur in the recommendation he has made as to the costs.

GREER L.J. I agree. The question that the Commissioners had to determine was whether the sum of 1066*l.*, on which the Crown sought to charge the respondent with super-tax, was his income, or part of his income, during the taxing year in question. It was part of a larger sum which judged by the accounts the executors presented and which I think we are entitled to presume were presented to the respondent and the other beneficiaries, the cestuis que trust, was a sum which was allocated to him as his share of the income of the trust fund and not his share of the capital of the trust funds. The question is whether or not, having regard to all the facts of the case, the Commissioners were entitled to say that he must be treated as having received, as his share of the income of the trust created in his father's estate, that sum of 1066*l.* If there was evidence on which the Commissioners could draw that conclusion and evidence the other way, it was for them to decide as a question of fact which was the true view to take of the facts, having regard to all the evidence—those which bore in favour of the Crown and those which bore in favour of the respondent. We have been invited by both sides to say that the facts proved were conclusive. We are invited by counsel for the Crown to say the facts proved were conclusive in their favour; we have been invited by counsel for the respondent to say the facts were conclusive in his favour. In my view there were facts on both sides which the Commissioners were bound to consider, and upon which they were bound to give their own judgment, and they were not, as they say they were, in a position in which, having regard to the decision in *Daw* v. *Inland Revenue Commissioners* (1), it was not possible for them to hold the residue of the estate had been ascertained at December 31, 1924, or in their consequent finding to hold that it was not possible for them to find that the alleged income of 1066*l*. was not income for the purposes of super-tax.

I think it necessary that I should consider just for a minute or two the terms of the will under which this trust arose. After the appointment of executors and trustees, the testator devised all his real and personal estate to the trustees, and if the trustees had been different persons from the executors no trust could possibly have commenced until the executors had administered the estate, complied with the terms of the legacy and handed the property over to the trustees. But in this, as in a great many other cases, the trustees and the executors were the same persons, and one of the first things to be determined by the tribunal of fact is whether, taking all the facts together, the persons who were made executors and trustees must be deemed to have accepted the legacy in their favour, and their duties as executors had finished. That does not dispose of the case, because when, as trustees, they get the estate they have still to pay, according to the will, the "funeral and testamentary expenses and debts and pay or provide for any legacy or annuity hereby or by any codicil hereto bequeathed and subject thereto shall stand possessed of my residuary estate and the rents and income thereof upon trust" for, amongst other people, the respondent. Therefore, prima facie, if they have not first of all paid funeral and testamentary expenses and made the other payments that I have just referred to, they do not hold the residue for the beneficiaries. That fact, of course, is a very strong fact in favour of the taxpayer in this case, because he says: "Here there is still remaining one debt: it is quite true it is a mortgage debt, but it is still a substantial debt that has not been paid and the tribunal ought not, therefore, to assume that the trustees have taken to themselves the residue for and on behalf of the beneficiaries." The time has not come, they say. But that does not, by any manner of means, conclude the matter, because it is quite possible for those who are in the position of trustees, and those who are in the position of beneficiaries, to say: "The convenient way to deal with this property is to postpone the payment of the mortgage debts and yet at the same time to hand out under the trust in favour of the beneficiaries their share of what can be handed out, having regard to the continued existence of the mortgage debt." There are various facts in this case from which I think the Commissioners would have been entitled, if they had so chosen, to draw the conclusion that, notwithstanding the existence of this liability, which has not yet been discharged, still by the conduct of the parties the trustees and the beneficiaries had dealt with the assets of the testator under the provisions of the will relating to the trust for the beneficiaries and they had allocated to them not merely part of the capital; they had allocated and paid for their benefit a share of the income which was being received from time to time, and if they did that I should think the Commissioners would be entitled to come to the conclusion that the money so used for the benefit of the beneficiaries was their income from the trust property—their share of the trust income, and not a payment on account of their possible rights in the future to share in the corpus. If that is so, the matter would be entirely open to them to give a decision as to whether or not they were satisfied that the sum in question had, before it was paid, or rather at the time it was paid, become income of the beneficiary. Therefore, for these reasons, as well as those which have been given by my Lords, I agree that this appeal should be allowed and the Commissioners should do what they have not yet done—make up their minds upon the evidence which has been given as to what they find on the question of fact which they have to determine.

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(1) 14 Tax Cas. 58.

I should just like to say one word about *Daw's* case. (1) I do not regard *Daw's* case (1) as laying down any rule to the effect that wherever there is an unpaid debt that necessarily prevents a sum which is paid by trustees as part of the income to the trust fund of the beneficiaries from becoming income for the purposes of the Income Tax Acts, or the super-tax, or surtax, as it is now called. I only regard it as a decision upon the facts proved in that case. The facts were all one way, and no other conclusion could be drawn except the conclusion to which the learned judge came.

Appeal allowed and Case remitted to Commissioners for further finding as to facts.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Collen Jones & Co.*

(1) 14 Tax Cas. 58.

W. I. C.

THE KING *v.* SCOFFIN.

C. C. A.
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Criminal Law—Sentence—Remission to Assizes for Sentence—Borstal Institution—Age of Accused—"Is" Twenty-one Years of Age—Criminal Justice Administration Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 10, *sub-s.* 1—*Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 46, *sub-s.* 1.

Where an accused person is convicted at petty sessions and remitted to quarter sessions or assizes for sentence under s. 10 of the Criminal Justice Administration Act, 1914, as amended, the material time at which to ascertain his age in connection with the power of the court to order his detention in a Borstal institution is that when sentence is passed, not that of his conviction.

Appeal against sentence.

The appellant, Sidney Scoffin, was charged at Rochdale Petty Sessions on January 22, 1930, with larceny in a dwelling-house. He elected to be dealt with summarily and was convicted. The magistrates, purporting to act under the provisions of s. 10 sub-s. 1 of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), as amended by s. 46 sub-s. 1 of the Criminal Justice Act, 1925, sent him to Manchester Assizes for sentence, it appearing to them that he was then "not less than sixteen nor more than twenty-one years of age" within the meaning of s. 10 sub-s. 1 (*a*) of the Act of 1914. By the said sub-section, as amended, "if it appears to the court [assizes or quarter sessions] that the offender is of such age as aforesaid" it may order him to be detained in a Borstal institution; otherwise the court may deal with the case in any way in which the court of summary jurisdiction might have dealt with it.

The appellant was born on February 17, 1909, and was therefore twenty-one years of age on February 16, 1930, and was convicted at petty sessions as stated on January 22, 1930, being then under twenty-one years of age. The commission day at Manchester Assizes was February 17, 1930, and on February 18, 1930, Swift J. sentenced him to three years' detention in a Borstal institution.

The appellant appealed against the sentence.

E. G. Woodward for the appellant. There was no power to pass this sentence, as the appellant was more than twenty-one years of age when the sentence was passed, even assuming it to date back to the commission day. Sect. 10 sub-s. 1 of the Act of 1914 as amended empowers the court—meaning the court which passes sentence—"if it appears . . . . that the offender is" not more than twenty-one years of age, to order his detention in a Borstal institution. "Is" refers to the time when he is before the assizes, not to the time of his conviction at petty sessions, and at that time he was more than twenty-one.

[He was stopped.]

P. E. Brierley for the Crown. Sect. 10 sub-s. 1 says "if it appears to the court that the offender is of such age as aforesaid." "As aforesaid" refers to para. (*a*)—namely, the age which he appeared to the court to be when at petty sessions, and he was then under twenty-one years of age. Further, one is twenty-one years of age until one is twenty-two. This contention receives some support from s. 59 of the Children Act, 1908 (8 Edw. 7, c. 67), which deals with a person "apparently of the age of fourteen or fifteen years," and obviously refers to a "young person." "Young person" is defined by s. 131 of the Act as a person who is "fourteen years of age or upwards and under the age of sixteen years," so that a person between fifteen and sixteen would still be "of the age of . . . . fifteen years" within the operation of s. 59. The date of conviction is the material date.

[Lord Hewart C.J. Petty sessions could not send him to Borstal; only quarter sessions or assizes can do that, and it is the age when they deal with him which is material.]

[*Rex* v. *McCann* (1) was referred to.]

The judgment of the Court (Lord Hewart C.J., Talbot and Finlay JJ.) was delivered by

Lord Hewart C.J. This appellant was charged at Rochdale Petty Sessions with stealing in a dwelling-house a set

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(1) (1911) 6 Cr. App. Rep. 115.

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of false teeth. He elected to be dealt with summarily, and the justices sent him to Manchester Assizes for sentence. There he was sentenced by Swift J. to be detained for three years in a Borstal institution. Against that sentence he appeals.

The appellant was born on February 17, 1909; he therefore completed twenty-one years on February 16, 1930. The commission day of Manchester Assizes was not until February 17, and he was sentenced on February 18. Therefore on commission day he was one day more than twenty-one years of age, and on February 18, when he was sentenced, he was two days more than twenty-one. Now s. 10 sub-s. 1 of the Criminal Justice Administration Act, 1914, provides that a person may be sent to Borstal if it appears to the court that he "is" not more than twenty-one years of age. Counsel for the Crown had two difficulties in his way: firstly, to convince us that the words in the sub-section "nor more than twenty-one years of age" mean "not so much more than twenty-one years of age," and, secondly, to convince us that in a proper case "is" means "was." Could he have surmounted these difficulties no doubt our decision might have been different. There is much to be said for the view that the statute might have been differently worded, but that is not a question for this Court. We have no doubt that the appellant was above the age mentioned in the statute, and he must therefore forego the benefits of Borstal treatment, and instead go to prison for six months in the second division.

Appeal allowed. Sentence varied.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

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